No. 86-1316

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ETHEL R. HARRIS, as Trustee under the Trust Agreement dated March 1, 1973, et al.,

Petitioners,

v.

THE SENTRY CORPORATION and SNE CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

In *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751 n.11 (1980), this Court specifically reserved the question whether Rule 3 of the Federal Rules of Civil Procedure is a tolling provision for a statute of limitations borrowed from state law in a cause of action based on federal law.

After *Walker*, a conflict in the Circuits developed. This case presents the following question: whether, in light of the Fifth Circuit's directly conflicting ruling in *Checki v. Webb*, 785 F.2d 534 (5th Cir. 1986), the Seventh Circuit erred by holding that the filing of a federal cause of action under Rule 3 tolls a borrowed state statute of limitations which mandates both filing and service of process within the limitations period.

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

In the Seventh Circuit, The Sentry Corporation and the SNE Corporation were plaintiffs-appellants. The petitioners in this Court are identical to the defendants-appellees in the Seventh Circuit; they are all the individual shareholders of Harris-Crestline Corporation on October 30, 1981:

ETHEL R. HARRIS, as Trustee under Trust Agreement dated March 1, 1973; ETHEL R. HARRIS, Successor Trustee under Mortimer B. Harris Trust Agreement dated December 26, 1979; JEANNE HARRIS HANSELL; HELEN HARRIS BRANDT; MARY HARRIS MARKS; WILLIAM M. REDFIELD; NANCY BARRY; NANCY JO BARRY, as Custodian for Anita Barry, a Minor under the Idaho Uniform Gifts to Minors Act; NANCY JO BARRY, as a Custodian for Julie E. Barry, a Minor under the Idaho Uniform Gifts to Minors Act; NANCY JO BARRY, as a Custodian for Michelle Barry, a Minor under the Idaho Uniform Gifts to Minors Act; NANCY JO BARRY, as a Custodian for Phillip Barry, a Minor under the Idaho Uniform Gifts to Minors Act; NANCY JO BARRY, as a Custodian for Sean Patrick Barry, a Minor under the Idaho Uniform Gifts to Minors Act; MICHELLE BARRY; EDWARD S. SEIM; PHILLIP BARRY; BONNIE DWYER, as a Custodian for Richard J. Dwyer, a Minor under the Illinois Uniform Gifts to Minors Act; BONNIE DWYER, as a Custodian for Sheila Marie Dwyer, a Minor under the Illinois Uniform Gifts to Minors Act; BONNIE DWYER, as a Custodian for Kristy Dwyer; BONNIE DWYER, as a Custodian for Robert P. Dwyer; HERB DWYER; BONNIE DWYER; DANIEL L. GRAY, as a Custodian for Jean Ann Gray, a Minor under the Illinois Uniform Gifts to Minors Act; DANIEL L. GRAY, as a Custodian for Karen Gray, a Minor under the Illinois Uniform Gifts to Minors Act;

DANIEL L. GRAY, as a Custodian for Thomas J. Gray, a Minor under the Illinois Uniform Gifts to Minors Act; JOSEPHINE GRAY; MARY GRIMES, as a Custodian for Anna M. Grimes, a Minor under the Uniform Gifts to Minors Act; MARY GRIMES, as a Custodian for John Grimes, a Minor under the Uniform Gifts to Minors Act; MARY GRIMES, as a Custodian for Mary E. Grimes, a Minor under the Uniform Gifts to Minors Act; MARY GRIMES, as a Custodian for Kathleen Grimes, a Minor under the Uniform Gifts to Minors Act; MARY GRIMES, as a Custodian for Therese Grimes, a Minor under the Uniform Gifts to Minors Act; MARY GRIMES, as a Custodian for William Grimes, a Minor under the Uniform Gifts to Minors Act; MARY GRIMES, as a Custodian for Michelle F. Grimes, a Minor under the Uniform Gifts to Minors Act; THOMAS J. MANEY, as Trustee under the Anne Mary Riordan Trust dated January 2, 1973; THOMAS J. MANEY, as Trustee under the Mary T. Riordan Trust dated June 28, 1972; THOMAS J. MANEY, as Trustee under the Patrick Jogues Riordan Irrevocable Trust; THOMAS J. MANEY, as Trustee under the Thomas L. Riordan Trust dated June 28, 1972; LORRAINE McCAHILL, as Custodian for Mary Jo McCahill; LORRAINE McCAHILL, as Custodian for William F.X. McCahill; THOMAS E. McCAHILL, JR. and MRS. LORRAINE McCAHILL, as Joint Tenants with the Right of Survivorship and not as Tenants in Common; SANDRA PRENDERGAST; LAWRENCE T. RIORDAN; VIRGINIA A. RIORDAN; LOUISE B. MYERS; WAYNE HUMMER & CO. by PHILIP M. BURNO; DANA LYNN HARRIS, by THOMAS NEW HARRIS, her guardian; ELLEN D.A. HARRIS: HELAN N. HARRIS, as Executor of the Will of Francis L. Harris, deceased; HELEN H. HARRIS; JODY LEIGH HARRIS, by THOMAS NEW HARRIS, her guardian; JULIET M. HARRIS; KEITH W. HARRIS; KENNETH A. HARRIS; KENNETH A. HARRIS, JR.; LYNN HARRIS MERLO; S.H. HARRIS; HELEN M. WILLNER; THOMAS NEW HARRIS; JANE STADELMAN BARNES; EVELYN E. STADELMAN; LEONA T. STADELMAN; and LYNN A. STADELMAN.

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OCTOBER TERM, 1986

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Petitioners,

v.

THE SENTRY CORPORATION and SNE CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Ethel R. Harris, as Trustee under the Trust Agreement dated March 1, 1973, and all of the other individual shareholders of Harris-Crestline Corporation on October 30, 1981,[1] respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

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[1] All of the petitioners in this Court are identified at pages ii-iii, *supra*.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 802 F.2d 229 and appears at App. 1.[2] The order of the United States Court of Appeals for the Seventh Circuit denying the petition for rehearing with a suggestion for rehearing *en banc* is not reported and appears at App. 35. The order and opinion of the United States District Court for the Western District of Wisconsin is not reported and appears at App. 36.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1986. The petition for rehearing with suggestion for rehearing *en banc* was denied on November 12, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULES AND STATUTES INVOLVED

Wisconsin Uniform Securities Law, Wis. Stat. Ann. § 551.59(5) (West 1982) provides:

> No action shall be maintained under this section unless commenced before the expiration of three

[2] "App." refers to the Appendix to this Petition.

years after the act or transaction constituting the violation or the expiration of one year after the discovery of facts constituting the violation, whichever first expired.

Wis. Stat. Ann. § 893.02 (West 1982) provides:

> An action is commenced, within the meaning of any provision of law which limits the time for the commencement of an action, as to each defendant, when the summons naming the defendant and the complaint are filed with the court, but no action shall be deemed commenced as to any defendant upon whom service of authenticated copies of the summons and complaint has not been made within 60 days after filing.

Wis. Stat. Ann. § 801.02(1) (West 1982) provides:

> A civil action in which a personal judgment is sought other than certiorari, habeas corpus, mandamus or prohibition, is commenced as to any defendant when a summons and a complaint naming the person as defendant are filed with the court, provided service of an authenticated copy of the summons and of the complaint is made upon the defendant under this chapter within 60 days after filing.

Rule 3 of the Federal Rules of Civil Procedure provides:

> A civil action is commenced by filing a complaint with the court.

Rule 4(j) of the Federal Rules of Civil Procedure provides in relevant part:

> If a service of the summons and complaint is not made upon the defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. . . .

STATEMENT OF THE CASE

On October 30, 1981, the shareholders of Harris-Crestline Corporation sold all of their stock to Sentry Corporation ("Sentry"). On October 26, 1984, four days before the third anniversary of the sale, Sentry filed this action in the United States District Court for the Western District of Wisconsin. Sentry charged the shareholders with a violation of section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(b), and with pendent Wisconsin securities, fraud, and negligent misrepresentation claims arising out of the sale.

Under Wisconsin law, in order to meet the applicable limitations requirement, Sentry was required to file and serve its complaint within three years of the date of sale or, alternatively, it was required to file within three years and serve within sixty days thereafter. Wis. Stat. Ann. §§ 893.02, 801.02(1) (West 1982). Sentry did not comply. Instead, Sentry waited to serve process until January 30, 1985 (App. 44)—over 90 days after filing its complaint. Sentry has never explained its delay in affecting service.

The District Court's Decision

The petitioners filed a motion to dismiss Sentry's claims on the grounds that Sentry had failed to meet the applicable Wisconsin limitation requirements. The district court granted the motion, ruling that because there is no applicable federal limitations period, both Sentry's federal securities claim and its state securities claim are governed by the three-year Wisconsin securities limitation statute. Wis. Stat. Ann. § 551.59(5) (West 1982). (App. 43, 48.)

Recognizing that under Wisconsin law the service of process requirement is an integral part of the limitations statute, the district court held that, for purposes of the Wisconsin securities limitations statute, an action is commenced when the filed complaint is served on the defendant. Wis. Stat. Ann. §§ 893.02, 801.02 (West 1982). (App. 44.) The district court also held that the Wisconsin limitations period may be tolled for up to 60 days after the three-year period if the complaint is filed within the limitations period and service is made within 60 days of filing the complaint. Wis. Stat. Ann. § 893.02 (West 1982). (App. 44.) In light of the undisputed fact that Sentry served its complaint 30 days beyond the last day of the period within which a securities suit may be brought under Wisconsin law, the district court ruled that Sentry's federal and state securities claims were both barred by the Wisconsin limitations statute. (App. 43, 44, 49-50.)

In reaching this result, the district court relied heavily on two decisions of this Court, *Wilson v. Garcia*, 471 U.S. 261 (1985), and *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975). The district court cited this Court's recent approval of the rule that " 'the length of the limitations period, and closely related questions of tolling and application, are to be governed by state law.' " *Wilson v. Garcia*, 471 U.S. at 269. (App. 45.) The district court also relied on this Court's analysis that, in borrowing a limitations period, the federal courts should adopt the value judgment of the state legislature which enacted the statute, and must therefore employ all calculation provisions which define the length of the period:

> Any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action. Although any statute of limitations is neces-

> sarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting prosecution of stale ones. In virtually all statutes of limitations the chronological length of the limitation is interrelated with provisions regarding tolling, revival, and questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim.

Johnson v. Railway Express Agency, Inc., 421 U.S. at 463-64. (*Quoted* at App. 45.)

The Seventh Circuit's Decision

The Seventh Circuit specifically recognized that it was faced with a complex issue on which there was a conflict among the Circuits. (*E.g.*, App. 1, 33.) In a lengthy opinion, it affirmed the district court judgment in part and reversed in part. The Seventh Circuit recognized that the district court's rulings were correct on the applicable Wisconsin limitations provision and on the integral nature of the Wisconsin service requirement. (App. 2, 8, 13.) Nevertheless, the Seventh Circuit ruled that Wisconsin law requiring filing and service in order to toll the limitations period was not controlling. (App. 33.) The Seventh Circuit dismissed as *dicta* this Court's statement in *Wilson v. Garcia* requiring the borrowing of all rules that affect the calculation of the limitations period, and held that state calculation rules apply only when federal law is silent. (App. 12.)

The Seventh Circuit recognized that this Court's decision in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980),

established that Rule 3 was not intended to be a tolling provision. (App. 10, 25-29.) Nevertheless, the Seventh Circuit held that this Court's explanation of its own intent in drafting Rule 3 was limited to diversity cases and pendent state claims, and that in all other federal cases in which a state statute of limitations is borrowed the plain meaning of Rule 3 was different—in federal question cases Rule 3 was intended to affect the calculation of the limitations periods. (App. 26, 28.)[3]

Despite the Seventh Circuit's holding that in federal question cases Rule 3 is a tolling provision, the Seventh Circuit also held that Rule 3 is purely "procedural" and not "substantive." It based this conclusion on the rationale that the tolling of the limitations period affects only the "remedy" and does not achieve a "substantive objective" of federal law. (App. 9.)

The Seventh Circuit reversed the district court's ruling dismissing the federal securities count. At the same time, however, the Seventh Circuit affirmed the district court's dismissal of the state securities claim, which turned on the application of precisely the same Wisconsin limitations statute. (App. 33-34.)

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[3] In addition to holding that Rule 3 is a tolling provision, the Seventh Circuit noted that Rule 4(j) may also extend the limitations period. (App. 7-8 n.7.)

REASONS FOR GRANTING THE WRIT

The ruling of the Seventh Circuit in this case—that Rule 3 acts as a tolling provision—directly conflicts with the decision of the Fifth Circuit in *Checki v. Webb*, 785 F.2d 534 (5th Cir. 1986), and involves an issue specifically left open by this Court in *Walker v. Armco Steel Corp.*, 446 U.S. at 751 n.11. The Seventh Circuit's ruling is also irreconcilable with the principle expressed in *Wilson v. Garcia*, 471 U.S. at 269, that when the federal courts borrow state limitations periods, they adopt a state legislative judgment and must therefore measure the period in the way mandated by the state legislature.

As this Court recognized in *Walker v. Armco Steel Corp.*, limitations periods reflect a balance between the plaintiff's right to sue and the defendant's rights to repose and to protection from stale claims. 446 U.S. at 751. The federal courts borrow state legislatures' evaluations of this balance when federal statutes do not provide a limitations period. The federal courts should not legislate by imposing limitations periods which they independently decide to be fair.

However, the Seventh Circuit did legislate here by extending the limitations period mandated by the Wisconsin legislature by up to the four months allowed for service under Rule 4(j). This ruling will have a radical impact on the length of the limitations periods mandated by state legislatures, affect the outcome of litigation, and foster inconsistent applications of identical statutes.

In *Wilson v. Garcia*, 471 U.S. at 270, this Court expressly noted the need for clearly defined rules which will foster uniform intrastate application of limitations rules.

This Court also cited with approval Justice Rehnquist's statement that "[f]ew areas of the law stand in greater need of firmly defined easily applied rules than does the subject of periods of limitations." *Wilson v. Garcia*, 471 U.S. at 266 (*quoting Chardon v. Fumero Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting)). Thousands of cases filed under federal statutes which have no limitations provisions, including, for example, cases filed under the federal securities acts, the Racketeer Influenced And Corrupt Organizations Act, 18 U.S.C. § 1961, and section 1983 of the Civil Rights Acts, 42 U.S.C. § 1983, are affected by the existing conflict among the Circuits on the proper application of Rule 3.

The issue presented is well developed and urgent. It was expressly noted and reserved for decision by this Court in *Walker v. Armco Steel Corp.*, 446 U.S. at 751, n.11. This Court should issue a writ of certiorari to resolve the conflict among the Circuits which has arisen since *Walker* and to establish a uniform rule consistent with this Court's prior holdings.

I.

THE SEVENTH CIRCUIT'S RULING CONFLICTS WITH THE FIFTH CIRCUIT'S DECISION IN *CHECKI v. WEBB.*

A. *Wilson v. Garcia* And *Johnson v. Railway Express Agency, Inc.* Support the Fifth Circuit's Decision That Rule 3 Does Not Toll State Limitations Statutes Which Require Service.

In *Wilson v. Garcia*, a federal civil rights action in which a borrowed state limitations statute applied, this Court stated that " 'the length of the limitations period, and closely related questions of tolling and application, are to be governed by state law.' " 471 U.S. at 269. This Court has also repeatedly stated that: "[i]n virtually all

statutes of limitations the chronological length of the limitations period is interrelated with provisions regarding tolling, revival, and questions of application." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 464, quoted in *Wilson v. Garcia*, 471 U.S. at 269 n.17.

Following this analysis, the Fifth Circuit held, in *Checki v. Webb*, 785 F.2d at 536, that, in section 1983 cases, Rule 3 does not toll borrowed limitations statutes which require service of process. *Contra*, *Lyons v. Goodson*, 787 F.2d 411 (8th Cir. 1986).[4] *Checki* properly follows *Wilson v. Garcia*'s direction that, once an analogous state limitations period is chosen, "federal law incorporates the state's judgment on the proper balance between policies of repose and substantive policies of enforcement embodied in the state cause of action." 471 U.S. at 271.

The direct conflict among the Circuits over the proper interpretation of Rule 3 should be resolved by this Court. The uncertainty perpetuated by these conflicting rulings should be eliminated.

B. The Seventh Circuit's Decision Conflicts With This Court's Decision In *Walker v. Armco Steel Corp.*

The Seventh Circuit's decision is bottomed on its holding that Rule 3 was intended to be a tolling provision in non-diversity cases. Under the Seventh Circuit's syllogism, if Rule 3 is a tolling provision, it is a directly controlling federal rule and supersedes state law. (App. 7.) However, this syllogism is false, because its central premise is

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[4] In two cases which antedate *Wilson v. Garcia*, the Second and Sixth Circuits held that filing under Rule 3 tolls the borrowed limitations statute. *Mohler v. Miller*, 235 F.2d 153, 155 (6th Cir. 1956); *Bomar v. Keyes*, 162 F.2d 136, 140 (2d Cir.), *cert. denied*, 332 U.S. 825 (1947).

squarely contrary to this Court's holding in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), that Rule 3 is not a tolling provision.

Walker was a diversity case which, as the Seventh Circuit recognized, is "virtually indistinguishable" from this case. (App. 25.) In *Walker*, the complaint was filed within the limitations period but served four months later. Under the applicable Oklahoma statute, the action was not "commenced" for purposes of the limitations statute until service of summons upon the defendant. 446 U.S. at 742. In *Walker*, as in this case, the action would have been deemed "commenced" within the period if the complaint had been filed within the limitations period and if the defendant had been served within sixty days of filing. 446 U.S. at 740.

In *Walker*, this Court expressly rejected the contention, at the heart of the Seventh Circuit's ruling, that Rule 3 was intended to affect the calculation of limitations periods:

> Rule 3 simply provides that an action is commenced by filing the complaint and has as its primary purpose the measuring of time periods that begin running from the date of commencement; the rule does not state that filing tolls the statute of limitations.

Walker, 446 U.S. 750, n.10. (*quoting* 4 C. Wright & A. Miller, Federal Practice and Procedure § 1057, p. 191 (1969).[5] The plain meaning of Rule 3 cannot vary from case to case. The Seventh Circuit's ruling is patently unsound.

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[5] Similarly in *Schiavone v. Fortune*, 106 S. Ct. 2379, 2385 (1986), this Court rejected the contention that Rule 4 had any effect on limitations statutes: "Rule 4 deals only with process." *Id.*

The Seventh Circuit compounded its erroneous interpretation by holding that Rule 3 is "procedural" because it affects only the remedy. This ruling directly conflicts with this Court's repeated holdings that, because limitations statutes can bar recovery, they are vital substantive rules. *See, e.g., Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *see also Board of Regents v. Tomanio*, 446 U.S. 478, 484 (1980). ("In § 1983 actions, . . . a state statute of limitations and the coordinate tolling rules . . . are binding rules of law.") If Rule 3 acts as a tolling provision, it has a substantive impact.[6]

In *Walker*, this Court reserved precisely the question raised here: whether Rule 3 might be applied to affect borrowed state limitations periods or federal limitations periods. *Walker*, 446 U.S. at 751, n.11. However, nothing in *Walker* suggests that the plain meaning of Rule 3 differs from case to case. On the contrary, this Court recognized in *Walker* that in a diversity case Rule 3 determines only when a suit is commenced. The filing of a suit may affect

[6] The Seventh Circuit's erroneous characterization of procedure and substance is also demonstrated by its misplaced reliance on *Holmberg v. Armbrecht*, 327 U.S. 392 (1946). In *Holmberg*, which involved a borrowed state limitations statute, the Court reasoned that there is a supervening federal policy which requires federal courts to toll limitations periods in fraud cases where a diligent plaintiff has been prevented from discovering the fraud. *See Guaranty Trust v. York*, 326 U.S. at 105-106. *Holmberg* would support the Seventh Circuit's ruling only if Rule 3 reflects a substantive federal tolling policy, *see Board of Regents v. Tomanio*, 446 U.S. at 487-88, a proposition which *Walker* rejected, and which would render Rule 3 vulnerable to challenge under the Rules Enabling Act which provides in relevant part that the federal rules: "shall not abridge, enlarge, or modify any substantive right . . . ." 28 U.S.C. § 2072 (1982).

the calculation of the limitations period only when service of process is not integral to a limitations period.[7]

This is the analysis adopted by the Eleventh Circuit in *Howard v. Lockheed-Georgia Co.*, 742 F.2d 612 (11th Cir. 1984) (*per curiam*). In *Howard*, the court held that, under the federal limitations statute borrowed from section 10(b) of the National Labor Relations Act, the failure to serve a federal complaint for a breach of a duty of fair representation within the six month period of limitations defeated the claim.[8] The court relied on the *Walker* rationale that Rule 3 establishes only that an action is "commenced"—not that the limitations period is tolled by the filing of the complaint. *Id.* at 613. Therefore, if the federal limitations statute requires only that the action be brought or commenced, Rule 3 defines when it is brought. But if the limitations statute requires both filing and service, service is required to toll the limitations period. *Id.* at 614.[9]

In *Walker*, this Court specifically recognized that, as a matter of policy, a legislature may require notice to the defendant by service of process within a fixed limitations period:

> The statute of limitations establishes a deadline after which the defendant may legitimately have peace of mind; it also recognizes that after a certain period

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[7] Under Wisconsin law, the running of the limitations period extinguishes the right of action. *Lak v. Richardson-Merrell*, 100 Wis.2d 641, 302 N.W.2d 483 (1981).

[8] In *DelCostello v. Teamsters*, 462 U.S. 151 (1983), this Court held section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), applied to this type of hybrid federal claim.

[9] There is a conflict among the Circuits on the construction of section 10(b) of the NLRA in these cases, which is discussed below, at p. 15.

> of time it is unfair to require the defendant to attempt to piece together his defense to an old claim. A *requirement of actual service* promotes both those functions of the statute.

Walker, 446 U.S. at 751 (emphasis added).[10]

The rule in *Howard* is clear and properly harmonizes the *Walker* decision with the cases which apply Rule 3 to statutes that have no service requirement. If a legislature determines that service within the limitations period is required, that legislative determination is controlling. If the legislature does not express any intent, Rule 3 governs the time of the commencement of the suit and for calculating the limitations period.

II.

THE SEVENTH CIRCUIT'S DECISION IMPROPERLY COMPLICATES THE LIMITATIONS RULES AND IS CONTRARY TO THE GOAL OF INTRASTATE UNIFORMITY IN THE APPLICATION OF LIMITATIONS STATUTES.

Firmly defined and easily applied limitations rules are needed in order to assure the effective administration of justice. In *Wilson v. Garcia*, this Court recognized that when limitations statutes are borrowed, there can never be nationwide uniformity. The Court therefore elected to follow a rule which would ensure that limitations statutes were applied uniformly within each state. 471 U.S. at 275.

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[10] Both filing and service may also be required under some circumstances in federal cases. For example, under Rule 15(c), the initial complaint must be both filed and served upon a defendant within the limitations period in order that the amended complaint may relate back to that defendant. *Schiavone v. Fortune*, 106 S. Ct. 2379 (1986).

The Seventh Circuit's decision in this case creates the very anomaly this Court denounced; it has established conflicting applications of limitations statutes. Under the Seventh Circuit's decision, the Wisconsin securities claim was held to be untimely and was dismissed, while the federal securities claim—which was governed by the same borrowed Wisconsin limitations statute—was held to be timely and was not dismissed.

When litigants bring suit under the securities acts, the civil rights acts, and numerous other federal statutes which require the federal courts to borrow state statutes of limitations, they need to have uniform and simple rules to apply. It makes no sense for the federal courts to borrow the state limitations period and then perform radical surgery on its term by adding up to four months to the time period the state legislature chose. The Seventh Circuit's analysis undercuts the borrowed legislative judgment.

In *West v. Conrail*, 780 F.2d 361 (3d Cir. 1985), *cert. granted*, 106 S. Ct. 3293 (1986), this Court accepted certiorari to resolve the division among the Circuits on the application of section 10(b) of the National Labor Relations Act to breach of duty of fair representation claims.[11] Because the issue in *West v. Conrail* may be limited to a construction of this Court's decision in *DelCostello v. Teamsters*, 462 U.S. 151 (1983), or to resolving the in-

[11] *West v. Conrail* adopts the rule that the service requirement of section 10(b) applies, and filing does not toll running of the limitations period. *Accord, Gallon v. Levin Metal Corp.*, 779 F.2d 1439 (9th Cir. 1986); *contra, Ellenbogen v. Rider Maintenance Corp.*, 794 F.2d 768, 772 (2d Cir. 1986) (the date of filing controls because section 10(b) of the NLRA is not a true limitations period); *Macon v. ITT Continental Baking Co.*, 779 F.2d 1166 (6th Cir. 1985) (the service requirement of section 10(b) was designed for administrative proceedings only).

terplay between two federal provisions, Rule 3 and section 10(b), this Court's decision is not likely to resolve the issue squarely presented by this Petition. There is an urgent need for guidance on the application of Rule 3 to borrowed state limitations statutes. This Court should grant certiorari to resolve the conflict in the Circuits by addressing the issue specifically reserved in *Walker*, 446 U.S. 751 at n.11., and to establish a clear and uniform rule.

In the alternative, if this Court anticipates that *West v. Conrail* may address whether Rule 3 tolls state limitations statutes, it should defer ruling on this Petition pending the decision in *West v. Conrail.*

CONCLUSION

A large number of litigants are affected by the existing conflict over the application of Rule 3 to borrowed state limitations periods. There is a pressing need to clarify and simplify the law. The Petition for Certiorari should be granted. In the alternative, this Court should defer ruling on this Petition pending the decision in *West v. Conrail.*

Respectfully submitted,

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APPENDIX

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85-2824

SENTRY CORPORATION and SNE CORPORATION,

Plaintiffs-Appellants,

v.

ETHEL R. HARRIS, as Trustee Under
Trust Agreement dated March 1, 1973, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 84-C-855-C—**Barbara B. Crabb,** *Judge.*

ARGUED MAY 28, 1986—DECIDED SEPTEMBER 16, 1986

Before CUDAHY and RIPPLE, *Circuit Judges*, and SWYGERT, *Senior Circuit Judge.*

SWYGERT, *Senior Circuit Judge.* This is yet another in a long line of cases in which the courts have sought with enormous difficulty to unravel the complexities created by Congress' failure to provide statutes of limitations to govern all federal causes of action. In this case the plaintiffs appeal from an order of the district court dismissing their federal securities claim as barred by the applicable state statute of limitations. The district judge held that when a federal court borrows a state statute of limitations to apply to a federal cause of action it must also borrow

those provisions relating to when the action is commenced and when service of process must be effectuated to toll the statute of limitations. We affirm in part, reverse in part, and remand for further proceedings.

I

The facts of this case, relevant to the issue presented on appeal, are not in dispute. The plaintiffs, Sentry Corporation and SNE Corporation, brought a federal 10b-5 securities claim, alleging that the defendants, Ethel R. Harris, as Trustee under Trust Agreement dated March 1, 1973, et al., had defrauded them in the sale of the stock of the Harris-Crestline Corporation. To that federal claim, the plaintiffs appended various state law claims. The plaintiffs' cause of action accrued on October 30, 1981, the date on which the stock purchase agreement containing the alleged misrepresentations was executed. The plaintiffs filed their complaint on October 26, 1984 and served the defendants with the complaint on January 30, 1985, ninety days later.

The defendants moved to dismiss the action on the ground, *inter alia*, that it was barred by the statute of limitations. Below both parties agreed that 10b-5 actions, which do not have their own federal limitations period, are governed by the most analogous state statute of limitations. *See Sperry v. Barggren*, 523 F.2d 708, 710 n.1 (7th Cir. 1975).[1] Both parties also agreed that Wis. Stat. § 551.59(5)

[1] Several commentators have argued that such an action should be governed by one of the express limitations periods in the Securities and Exchange Act because a 10b-5 action is judicially-implied, not expressly provided for by Congress. *See, e.g.*, Note, *A Cry for Help: The Ninth Circuit and the Statute of Limitations in Rule 10b-5 Actions*, 22 UCLA L. Rev. 947, 950-51 (1975) and authorities cited therein. They argue that as a result, it cannot be assumed that the congressional failure to set a limitations period means that Congress intended the courts to look to state law. *Cf. DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983) (judicially-implied cause of action subject to

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(1983), which was in effect at the time of the allegedly fraudulent transaction and which provided for a limitations period of three years, governed. The parties disagreed, however, whether state or federal law governed the questions of when the action was "commenced" for purposes of the statute of limitations and if and when service of process had to be completed in order to toll the statute of limitations.

Relying on recent Supreme Court civil rights cases, *see Wilson v. Garcia*, 471 U.S. 261, 105 S. Ct. 1938 (1985); *Chardon v. Fumero Soto*, 462 U.S. 650 (1983); *Board of Regents of University of New York v. Tomanio*, 446 U.S. 478 (1980); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), and a diversity case, *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), the district judge held that the issue of when the action was "commenced" should be governed by state law. She observed that under Wisconsin law, an action is "commenced" when the complaint is filed and the defendant is served with a copy of the complaint. *See* Wis. Stat. § 893.02 (1983). The district judge also observed that the plaintiff is given some leeway if he fails to serve the complaint within the applicable limitations period, here three years. If the defendant is served with a copy of the complaint within sixty days of filing, even though service occurs outside the limitations period, the action is deemed "commenced" as of the date of filing. Wis. Stat. § 801.02 (1983). The district judge concluded that this service limitation was an "integral part" of the Wisconsin statute of limitations period. She noted that in this

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[1] *continued*
analogous federal, not state, limitations period). In addition, they argue that because Congress did provide two express limitations periods in the Act, it can be assumed that Congress would have intended those provisions to cover all implied causes of action arising under the Securities and Exchange Act. Finally, they argue that a 10b-5 implied cause of action is more analogous to private rights of action expressly provided for in the Act than to state securities claims, and therefore the Act's express limitations periods should govern.

case the complaint was filed four days before the expiration of the three-year limitations period, but service was not made until January 30, 1985, thirty days after the sixty-day grace period had expired. She held that the action was therefore not "commenced" under Wisconsin law until January 30, 1985, more than three years after the cause of action had accrued, and it was therefore barred. The district judge also dismissed the pendent claims under *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), which holds that dismissal of the federal question claim prior to any lengthy pretrial proceedings requires, absent extraordinary circumstances, dismissal of all pendent claims.

II

Our analysis of the present case begins with two preliminary observations. First, in cases involving federal rights for which Congress has expressly provided a federal limitations period, Fed. R. Civ. P. 3 directly governs the issue of when an action is commenced for statute of limitations purposes, unless Congress has expressly provided otherwise. *See generally* 4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1056, at 177 (1969) and cases cited therein. The Supreme Court has held that when a federal rule (promulgated by the Court pursuant to the Rules Enabling Act) directly applies, its validity is to be tested under the Rules Enabling Act, 28 U.S.C. § 2072 (1982).[2] *Hanna v. Plumer*, 380 U.S. 460, 463-64, 470-71 (1965).

[2] The Rules Enabling Act provides:

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.
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> * * *

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The test to be applied is whether the rule "abridge[s], enlarge[s] or modif[ies] any substantive right." This test applies in both diversity and non-diversity actions.[3] *See, e.g., Chesny v. Marek*, 720 F.2d 474, 479-80 (7th Cir. 1983), *rev'd on other grounds*, ____ U.S. ____, 105 S. Ct. 3012 (1985); *see also* Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 737 n.226 (1974). To date, no court has ruled that, in the context of non-diversity cases governed by express federal limitations periods, Fed. R. Civ. P. 3 violates the Rules Enabling Act, 28 U.S.C. § 2072, and hence cannot be applied.[4]

Second, in cases involving a federal right for which there is no express limitations period, federal courts ordinarily borrow state limitations periods. They are not compelled to do so, however. Although the Supreme Court early on appeared to adhere to the view that the Rules of Decision Act, 28 U.S.C. § 1652 (1982),[5] compelled the applica-

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[2] *continued*

> Such rules shall not abridge, enlarge, or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

28 U.S.C. § 2072 (1982).

[3] *Hanna* also calls for consideration of whether the rule, if applied, would be beyond the power of Congress under the Constitution. It is too obvious to merit extended discussion that Congress could constitutionally prescribe when federal causes of action are deemed commenced for purposes of the statute of limitations.

[4] In *Bomar v. Keyes*, 162 F.2d 136, 141 (2d Cir. 1947), *cert. denied*, 332 U.S. 825 (1948), the court, speaking through Judge Learned Hand, found that in cases such as the one at bar, Fed. R. Civ. P. 3 does not violate the Rules Enabling Act. *See also DiVerniero v. Murphy*, 635 F. Supp. 1531 (D. Conn. 1986) (implicitly reaching the same result) ("However, Rule 3 promulgated pursuant to the Rules Enabling Act, 28 U.S.C. § 2072, does provide federal law sufficient to determine when a suit brought under section 1983 is commenced for statute of limitations purposes.").

[5] The Rules of Decision Act provides:

> The laws of the several states except where the Constitution or treaties of the United States or Acts of Congress other-

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tion of a state law (and therefore state limitations periods) where federal law was silent, *see McCluny v. Silliman*, 28 U.S. 270, 277 (1830), the Court subsequently modified its view. *See, e.g., Holmberg v. Armbrecht*, 327 U.S. 392, 394 (1946); *Board of County Commissioners v. United States*, 308 U.S. 343, 347-50 (1939); *Campbell v. Haverhill*, 155 U.S. 610, 614-15 (1895). In each of those cases, the Court made clear that the Rules of Decision Act did not compel the application of state law in federal causes of action, even where federal law was silent. The Court recently reaffirmed that conclusion in *Wilson*, 471 U.S. at ____, 105 S. Ct. at 1944 & n.22; *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 159-60 n.13 (1983); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977); *Johnson*, 421 U.S. at 465, noting that there is only a presumption in favor of the application of state law and that the federal courts still retain discretion to fill gaps in federal statutory law by formulating federal common law or by looking to other analogous law.[6] *See*

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[5] *continued*

wise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. § 1652 (1982).

[6] When the gap in the federal statutory law is the lack of an express limitations period, the federal courts traditionally have not exercised their discretion to formulate a limitations period. *See DelCostello*, 462 U.S. at 151 (Even though the Court expressly found that state limitations periods unduly burden federal rights, it did not formulate a federal limitations period; rather, it drew on express limitations periods found in another analogous federal statute.). The reason for this is that the courts have recognized that legislatures, not courts, are the appropriate formulators of arbitrary rules such as limitations periods. *See, e.g., Campbell v. Haverhill*, 155 U.S. 610 (1895); *see also* Note, *A Limitation on Actions*, 68 Colum. L. Rev. 763, 771 (1981); Note, *Limitation Borrowing in Federal Courts*, 77 Mich. L. Rev. 1127, 1131 (1979).

As one commentator has observed, however, the courts are "less hesitant to create uniform federal rules governing subsidiary issues related to the process of applying state statutes of limitations, such as tolling, characterization of the cause of action and definition of

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also American Pipe & Construction Co. v. Utah, 414 U.S. 538, 556 n.27 (1974). It is beyond cavil, however, that state law is only applied when there is no valid federal law directly governing the issue. *See, e.g., Hanna*, 380 U.S. at 465. And even when state law is applied, it becomes a part of the federal law and retains no independent significance. *See Wilson*, 471 U.S. at ____, 105 S. Ct. at 1943.

The question presented for review in the instant case then is whether Fed. R. Civ. P. 3, which directly controls when an action is commenced in cases involving federal rights expressly governed by federal limitations periods, directly controls when an action such as the one at bar is commenced. If it does control this issue, it must be applied notwithstanding contrary state law, unless, of course, it violates the Rules Enabling Act's prohibition against rules that would modify, abridge, or enlarge any substantive rights of the parties.

We now hold that Fed. R. Civ. P. 3 governs when cases such as the one at bar are commenced for statute of limitations purposes and that this rule is a valid exercise of the Supreme Court's rulemaking authority.[7] We therefore

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[6] *continued*
the time of accrual." Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 Cornell L. Rev. 1011, 1055 (1980); *accord* Note, *Federal Statutes Without Limitations Provisions*, 53 Colum. L. Rev. 68, 72 (1953) ("The failure of a federal statute to provide a limitations period is difficult to remedy by judicial action, but the courts are well situated to write federal law on the subsidiary issues involved in the limitation of actions.").

[7] In so doing, we need not reach the plaintiffs' other argument that Fed. R. Civ. P. 4(j) directly controls when service of process must be effectuated to toll the limitations period. The plaintiffs clearly served the complaint within the 120-day period and thus the issue does not arise whether a plaintiff's failure to comply with both Fed. R. Civ. P. 3 and 4(j) should result in a dismissal for untimeliness.

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find that it should be applied regardless of whether Wisconsin's service requirement is an integral provision of Wisconsin's statute of limitations.

There does not appear to be much dispute that Fed. R. Civ. P. 3 "passes muster" under the Rules Enabling Act. As the Court in *Hanna* observed:

> [T]he test must be whether a rule really regulates procedure, . . . the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.

Id., 380 U.S. at 464 (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)); *see also Marek v. Chesny*, ___ U.S. ___, 105 S. Ct. 3012, 3031 (1985) (Brennan, J., dissenting). When, as here, we are not "deal[ing] with a case in which the limitation is annexed as a condition to the very right of action created, . . . the statute of limitations is treated as going to the remedy." *Bomar v. Keyes*, 162 F.2d 136, 140-41 (2d Cir. 1947), *cert. denied*, 332 U.S. 825 (1947).

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[7] *continued*

We merely acknowledge that in federal question cases governed by express limitations periods, Fed. R. Civ. P. 4(j) might operate as a tolling provision. *See, e.g.*, Siegel, *Supplementary Practice Commentaries on Rule 4*, 28 U.S.C.A. Fed. R. Civ. P. 1 to 11, at C4-37 (West Supp. 1986); Walker, *1983 Amendments to Federal Rules of Civil Procedure 4—Process Jurisdiction and Erie Principles Revisted*, 19 Wake Forest L. Rev. 957, 976-77 (1983). *But see* 2 J. Moore & J. Luca, *Moore's Federal Practice*, ¶ 4.46 at 4-574 (2d ed. 1986). It may not, however, operate as a tolling provision in cases such as the one at bar. *Compare* Siegel, *supra*, at C4-37, C4-31, *with* Walker, *supra*, at 978, and the Supreme Court has apparently taken the view that at least in diversity actions, Fed. R. Civ. P. 4(j) does not operate as a tolling provision. *Schiavone v. Fortune*, ___ U.S. ___, ___; 106 S. Ct. 2379, 2385 (1986); *see also Morse v. Elmira Country Club*, 752 F.2d 35 (2d Cir. 1984); Siegel, *supra*, at C4-37. We further observe that the application of Fed. R. Civ. P. 4(j) to a case such as the one at bar would not have to meet the requirements of the Rules Enabling Act because the rule was passed by Congress, not the Supreme Court. *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 470 (7th Cir. 1984).

The substantive federal right therefore is not abridged by tolling the limitations period upon filing of the complaint because tolling in this case merely affects the remedy,[8] and is not "designed to achieve a substantive objective—such as compliance with the . . . [securities laws.]" *Marek*, ____ U.S. at ____, 105 S. Ct. at 3031 (quoting *Chesny*, 720 F.2d at 479). Thus, at least in this limited context, Fed. R. Civ. P. 3 is procedural both in nature and as applied. *Cf.* Walker, *The 1983 Amendments*

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[8] In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the Court held that in a case in which Congress had furnished both the federal right and the limitations period the proper test of whether a rule which tolls the statute of limitations impermissibly abridges a substantive right is "whether tolling the limitation is consonant with the legislative scheme." *Id.* at 557-58. *See also Burnett v. New York Central R.R.*, 380 U.S. 424, 426-27 (1965). In *American Pipe & Construction Co.*, the Court held that the commencement of a class action, pursuant to Fed. R. Civ. P. 23(a)(1), suspends the applicable statute of limitations as to all members of the class. It found that the "mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." *Id.* at 559.

In the instant case, the application of Fed. R. Civ. P. 3 would, of course, have to be consistent with the congressional scheme, not the state legislative scheme, since we are dealing with a federal right cognizable only in the federal courts and the state law becomes federal law for purposes of this particular case. Assuming, however, that this test is applicable to the case at bar, it is difficult to determine whether application of Fed. R. Civ. P. 3 is consonant with the legislative scheme because a 10b-5 action is judicially implied, not expressly created by Congress. Nevertheless, because Congress expressly provided for limitations periods for other causes of action arising under the Securities and Exchange Act, which are subject to the tolling effect of Fed. R. Civ. P. 3, it is not unreasonable to assume that application of Fed. R. Civ. P. 3 in this context would be "consonant with the legislative scheme." In this vein, it is significant that in the Notes of the Advisory Committee to Fed. R. Civ. P. 3, it was conceded that the rule might operate as a tolling provision. *See also Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.10 (1980).

to Federal Rule of Civil Procedure 4—Process, Jurisdiction and Erie Principles Revisited, 19 Wake Forest L. Rev. 957, 976-77 (1983) (suggesting that the problem in *Walker v. Armco Steel Co.*, 446 U.S. 740 (1980)—a diversity case—was that Fed. R. Civ. P. 3 was not procedural as applied).

The more difficult issue, disputed by the parties, is whether Fed. R. Civ. P. 3 directly speaks to the issue of tolling in the particular case before us. Although there is some suggestion to the contrary in *Walker*, 446 U.S. 740, which we discuss *infra* at 25-29, we believe that Fed. R. Civ. P. 3 applies here. Initially, we observe that Fed. R. Civ. P. 1 provides that "[t]hese rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81," and that none of the exceptions of Rule 81 apply. The Court in *Hanna* relied expressly and solely on this provision to sustain its conclusion that Fed. R. Civ. P. 4(d)(1) applied to the facts of that case. 380 U.S. at 463 n.3.

In addition, in our view, the language of Fed. R. Civ. P. 3 could not be much plainer. It states that the suit is "commenced" once the complaint is filed. "Commenced" as defined by Black's *Law Dictionary* means "to initiate by performing the first act," to "institute or start." Although the language of Fed. R. Civ. P. 3 does not expressly state that filing the lawsuit "tolls" the statute of limitations, the import of the language is clear that once the plaintiff has filed the complaint, he has done all that is necessary to "get the ball rolling" not only in terms of the other timing rules to which Fed. R. Civ. P. 3 relates, *see, e.g.*, Fed. R. Civ. P. 15(c), but also in terms of the statute of limitations. Indeed, the Supreme Court has recognized in *Schiavone v. Fortune*, ____ U.S. ____, 106 S. Ct. 2379 (1986), that the word "commence" carries with it tolling connotations even in the diversity context. *See id.* at ____, 106 S. Ct. at 2385.

It is also significant that Wisconsin law employs the phrase "commence" in its limitation provision, without ex-

pressly stating "tolling" to mean the limitations provision is tolled, *see* Wis. Stat. § 551.59(5) (1983). It also uses that phrase in its procedure provisions to mean tolling without express reference to tolling or the statute of limitations, yet there is evidently no dispute that "commencement" under Wisconsin law constitutes tolling.[9] We therefore believe that, *Walker* notwithstanding, the plain meaning of Fed. R. Civ. P. 3 is that filing the complaint tolls the statute of limitations.[10] *See also* Note, *Commencement Rules and Tolling Statutes of Limitations in Federal Court*, 66 Cornell L. Rev. 842, 850-51 & nn.51, 54 (1981) and cases cited therein.

The defendants argue that the result we reach today has been foreclosed by two Supreme Court decisions: *Wilson*, 471 U.S. at ____, 105 S. Ct. at 1938, and *Walker*, 446 U.S. at 740. The defendants assert that in *Wilson* the Supreme Court determined that in non-diversity cases in which there is no governing federal statute of limitations, the question of when an action commences is a question of tolling that is governed by state law so long as the commencement provision is an integral part of the state's statute of limitations. They argue that because the Wisconsin service of process requirement which tolls the statute of limitations for sixty days is an integral part of Wisconsin's statute of limitations, it must be applied to bar the instant action. They therefore reject plaintiffs' reliance on civil rights cases which have held that Fed. R. Civ. P. 3 governs commencement for tolling purposes either as having been overruled by *Wilson* or as having been incorrectly decided in light of *Wilson*. They further assert that, in any event, state law should control because,

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[9] To be sure, Wis. Stat. § 893.02 defines "commence" in terms of a limitation provision, but it too relies on the inextricable interrelatedness of the legal meaning of the word "commence" and the statutes of limitations.

[10] At least, of course, to the extent that Fed. R. Civ. P. 4(j) has been complied with insofar as it operates as a tolling provision. *See supra* note 7.

in their view, in *Walker* the Supreme Court decided that Fed. R. Civ. P. 3 does not directly control the issue of commencement in cases such as the one at bar.

The defendants' interpretation of *Wilson* is based on two observations made by the Supreme Court. In that case, the Court stated that although the issue of the characterization of a federal claim for limitations purposes is a question of federal law, "the length of the limitations period, and closely related questions of tolling and application, are to be governed by state law." *Id.* at ____, 105 S. Ct. at 1943 (citing *Chardon*, 462 U.S. at 657; *Tomanio*, 446 U.S. at 484; *Johnson*, 421 U.S. at 464). The Court also stated that the reason that questions of tolling are governed by state law is that the state's calculation of the proper length for a limitations period is ordinarily inextricably intertwined with the state's application of tolling provisions. *Wilson*, 471 U.S. at ____, 105 S. Ct. at 1943 n.17.

These statements do not support the interpretation that the defendants place upon them.[11] These are nothing more than restatements made in passing of the general rule applicable in civil rights cases and some other federal question cases that when federal law is silent, state law is presumptively applied. As we have already observed, this rule is not an imperative to be applied in all federal ques-

[11] Even if they did, they would not compel a different outcome. Defendants concede, as they must, that these two statements are dicta. This court has so recognized. *See Bailey v. Faulkner*, 765 F.2d 102, 104 (7th Cir. 1985). The Court in *Wilson* held only that in actions based on 42 U.S.C. § 1983, the federal courts should borrow the state limitations period applicable to personal injury actions. It did not hold that in any case in which a court borrows a state limitations period it must also always borrow all tolling provisions as well. In fact, this court in *Bailey* expressly relied on *Tomanio*, not *Wilson*, in deciding that the state tolling rule should be applied. And although the *Bailey* court appeared to give a broad interpretation to the rule set forth in *Tomanio*, *see Bailey*, 765 F.2d at 104, a closer examination of the case reveals that the court found that *Tomanio* controlled because the facts of the two cases were virtually indistinguishable.

tion cases not governed by a federal limitations period, or in fact, even in all civil rights actions. In the passage so heavily relied upon by the defendants, the Court makes clear that reference to state law in section 1983 actions occurs only after "principles of federal law are exhausted," *id.* at ____, 105 S. Ct. at 1943 (citing 42 U.S.C. § 1988), and even then the state rule is adopted only as " 'a federal rule responsive to the need whenever a federal right is impaired.' " *Id.* at ____, 105 S. Ct. at 1943 (quoting *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969)).

Our conclusion that these statements in *Wilson* do not stand for the proposition that all integral tolling provisions apply even when there is directly applicable federal law is supported by several considerations. First, the Supreme Court has previously recognized that federal law governs the issue of tolling in federal equity actions, *see Holmberg*, 327 U.S. at 395; *see also State of Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981); *Tomera v. Galt*, 511 F.2d 504, 509 (7th Cir. 1975), a ruling that has been extended by the lower courts to actions at law. *See, e.g., Moviecolor, Ltd. v. Eastman Kodak Co.*, 288 F.2d 80, 83-84 (2d Cir.), *cert. denied*, 368 U.S. 821 (1961); *see also Hobson v. Wilson*, 737 F.2d 1, 33 & n.100 (D.C. Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S. Ct. 1843 (1985); *cf. Burnett v. New York Central R.R.*, 380 U.S. 424, 435 (1965) (adopting uniform tolling rule in FELA action).

In addition, prior to *Wilson* and after *Walker*, the federal courts consistently held that Fed. R. Civ. P. 3 applies to determine when an action brought pursuant to 42 U.S.C. § 1983 has been commenced for limitations purposes. *Hobson*, 737 F.2d at 44 n.131; *Caldwell v. Martin-Marietta Corp.*, 632 F.2d 1184, 1188 (5th Cir. 1980); *Hoffman v. Halden*, 268 F.2d 280, 302 (9th Cir. 1959); *Jackson v. Duke*, 259 F.2d 3 (5th Cir. 1958); *Bomar*, 162 F.2d at 140; *Wells v. City of Portland*, 102 F.R.D. 796, 779, 801 (D. Ore. 1984); *Cohen v. Board of Education*, 536 F. Supp. 486, 493-95 (S.D.N.Y. 1982); *Gutierrez v. Vergari*, 499 F. Supp. 1040, 1049 (S.D. N.Y. 1980); *Fitzgerald v. Ap-*

polonia, 323 F. Supp. 1269 (E.D. Pa. 1971); *Von Clemm v. Smith*, 204 F. Supp. 110, 113 (S.D.N.Y. 1962). Many courts have continued to adhere to the view even after *Wilson*. *See, e.g., DiVerniero v. Murphy*, 635 F. Supp. 1531 (D. Conn. 1986); *Williams v. Allen*, 616 F. Supp. 653 (E.D.N.Y. 1985); *Ruley v. Nelson*, 106 F.R.D. 514 (D. Nev. 1985). *But see Checki v. Webb*, 785 F.2d 534, 536-37 (5th Cir. 1986). And, at least one court has decided that federal law governs when causes of action accrue in section 1983 cases. *See Singleton v. City of New York*, 632 F.2d 185, 191 (2d Cir. 1980), *cert. denied*, 450 U.S. 920 (1981).

Courts, including this one, have also found Fed. R. Civ. P. 3 to be controlling in federal question cases, other than civil rights, which are not governed by a federal statute of limitations. *See, e.g., Appleton Electric Co. v. Graves Truck Lines, Inc.*, 635 F.2d 603, 608-09 (7th Cir. 1980), *cert. denied*, 451 U.S. 976 (1981) (filing of complaint in literal compliance with Fed. R. Civ. P. 3 is sufficient to interrupt a federal statute of limitations); *Fitzgerald*, 323 F. Supp. at 1270; *Meredith v. Glamorene Products Corp.*, 55 F.R.D. 397 (E.D. Wis. 1972); *see also* 128 Cong. Rec. H 9850 n.14 (daily ed. Dec. 15, 1982); Note, *Federal Statutes Without Limitations Provisions*, 53 Colum. L. Rev. 68, 72 (1953) and cases cited therein ("[R]elated issues . . . need not be decided in accordance with state law despite the fact that it is a state statute which has fixed the period of limitation."); *cf. Hanna*, 380 U.S. at 470 (presumption that, when a situation is covered by one of the Federal Rules, that rule governs, displacing any state rule). This has also been the view taken by most commentators. *See, e.g.*, C. Wright, *The Law of Federal Courts* § 64, at 412 (1983); 4 C. Wright & A. Miller, *supra*, § 1056, at 179; 2 J. Moore & J. Lucas, *Moore's Federal Practice* ¶¶ 3.07[1]-[3], 3.07[4.-3-2], 3.07[5][8] (1977); Walker, *supra*, 19 Wake Forest L. Rev. at 975; Ely, *supra*, 87 Harv. L. Rev. at 729; Wheaton, *Federal Rules of Civil Procedure Interpreted*, 25 Cornell L.Q. 28, 30 (1939); Special Project, *Time Bars in Specialized Federal Com-*

mon Law: Federal Rights of Action and State Statutes of Limitations, 65 Cornell L. Rev. 1011, 1091 & n.380 (1980); Note, *supra*, 66 Cornell L. Rev. at 850-51. *But see* Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 Harv. L. Rev. 66, 91-92 (1955).

We do not believe that in making this passing reference to the general rule to be applied in such cases, the Supreme Court in *Wilson* intended to overrule, *sub silentio*, this long line of consistent authority, especially when all precedents relied upon by the Court in *Wilson* were civil rights cases. *Cf. Walker*, 446 U.S. at 749 ("*Stare decisis* does not mandate that earlier decisions be enshrined forever, but it does counsel that we use caution in rejecting established law.").

This is particularly true when one considers that the Supreme Court in *Wilson* used the ambiguous phrase "tolling provisions." Although the Court in *Walker* did refer to the commencement provision as a tolling provision, for purposes of analysis, courts and commentators have generally distinguished between those provisions relating to traditional tolling doctrines (fraudulent concealment, minority, other legal disabilities) and commencement provisions. *See, e.g.*, Note, *supra*, 53 Colum. L. Rev. at 72. With regard to the former, the traditional rule has been that state law controls; with regard to the latter, federal law controls. *Id.* We therefore believe that it would be inappropriate to interpret an ambiguous statement by the Court in a manner that contradicts long-adhered-to prior practice by the courts, including that of the Supreme Court. *See also* Ely, *supra*, 87 Harv. L. Rev. at 730 (Courts should be reluctant to overturn procedural rules which have previously been adhered to, even if technically they may be legally deficient. "[M]uch of the point of a set of procedural rules is to let people get used to and rely on the routine of doing things in a certain way.")

The dicta in *Wilson*, of course, did not arise in isolation. It was based on the Supreme Court's rulings in other

recent civil rights cases in which the Court gave effect to the state tolling provisions. *See, e.g., Chardon*, 462 U.S. at 650; *Tomanio*, 446 U.S. at 478; *Johnson*, 421 U.S. at 454. We cannot therefore reject the defendants' reliance on *Wilson* without also demonstrating why none of those other cases compel the result urged by the defendants.

The key to the result in each of those cases, as other courts have recognized, was that there was no federal tolling law directly on point. *See, e.g., DiVerniero*, 635 F. Supp. at 1535-36; *Cohen*, 536 F. Supp. at 495. In *Tomanio*, for example, the Supreme Court held that state law determined whether a plaintiff's civil rights action was tolled pending a state lawsuit arising from the same operative facts. In so doing, the Court referred to 42 U.S.C. § 1988 in which "Congress quite clearly instructs [federal courts] to refer to State statutes *when federal law provides no rule of decision for actions brought under § 1983.*" *Id.*, 446 U.S. at 484 (quoting *Robertson v. Wegmann*) (emphasis added).[12]

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[12] Section 1988 provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988.

The Court observed that the Second Circuit had formulated an *ad hoc* federal tolling rule because, in the Second Circuit's view, the state rule improperly burdened federal rights, inconsistent with the federal law, and therefore could not be applied under the express terms of 42 U.S.C. § 1988. The majority of the Court in *Tomanio* rejected the Second Circuit's view and found that state law should be applied. *Tomanio* therefore was not a case in which there was a pre-existing uniform federal law directly on point which the Supreme Court rejected in favor of the state tolling provision. Rather, it was a classic case of application of state law where federal law was silent and where the state law was found not to unduly burden or discriminate against federal rights.

In *Chardon*, the Court held that state law applied to toll the individual plaintiff's section 1983 claims pending litigation of a related class action. The Court rejected the defendant's argument that the federal tolling rule announced by the Court in *American Pipe & Construction Co.*, rather than the state rule, governed on the ground that the federal rule was not sufficiently broad to govern the issue presented in *Chardon*. It held "[i]n *American Pipe*, federal law defined the basic limitations period, federal procedural policies supported the tolling of the statute during the pendency of the class action, and a particular federal statute [Fed. R. Civ. P. 23] provided the basis for deciding that the tolling had the effect of suspending the limitations period. . . . [It did not] establish[ ] a uniform federal rule of decision that mandates suspension rather than renewal whenever a federal class action tolls a statute of limitations." *Id.*, 462 U.S. at 660-62.

Justice Rehnquist's dissent in *Chardon* makes clear that even in section 1983 actions, state tolling law does not govern when there is a directly controlling uniform federal tolling provision. Justice Rehnquist took the view that the *American Pipe & Construction Co.* rule, derived from Fed. R. Civ. P. 23, directly governed the issue presented and should be applied, notwithstanding the fact there was

a state tolling rule directly on point. He observed that "the [Supreme] Court has recognized that federal tolling rules apply to state statutes of limitations" and that "[a] single, uniform federal rule of tolling would provide desirable certainty to both plaintiffs and defendants in § 1983 class actions." *Id.* at 666-67 (Rehnquist, J., dissenting).[13]

Finally, in *Johnson*, 421 U.S. 474, the Supreme Court decided that the timely filing of a charge of employment discrimination with the Equal Employment Opportunity Commission pursuant to 42 U.S.C. § 2000e-5 does not toll the running of the period of limitations applicable to an action, based on the same facts, instituted under 42 U.S.C. § 1981. *Johnson*, like *Tomanio* and *Chardon*, was a case in which there were no directly controlling uniform federal tolling provisions. Thus, the issue was whether it was appropriate for the federal courts to develop such an *ad hoc* tolling law on the ground that the state tolling provision unduly burdened federal rights. *Id.* at 465. As in *Tomanio* and *Chardon*, the Court, in *Johnson*, found that the state tolling rule did not unduly burden the petitioner's section 1981 rights. It also rejected the petitioner's reliance on *American Pipe & Construction Co.* and *Burnett* for the proposition that the federal court should exercise its power to formulate federal tolling rules in that case. The Court found neither case helpful because in both "[t]he respective periods of limitation . . . were derived directly from federal statutes rather by reference to state law. Moreover, in each case there was a substantial body of relevant federal procedural law to guide the decision to toll the limitation period, and significant underlying federal policy that would have conflicted with a decision not to suspend the running of the statute." *Id.* at 466. Thus

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[13] The district court judge thought it irrelevant that Fed. R. Civ. P. 3 is a uniform rule. In her view, the "rule" announced in *Wilson*, derived from *Chardon*, *Tomanio*, and *Johnson* made no distinction between uniform and nonuniform tolling provisions. *Chardon* makes clear, however, that whether the rule is uniform is of critical significance.

Johnson, like *Tomanio* and *Chardon*, makes clear that state tolling rules only apply in the absence of express federal tolling rules.

Even if the Supreme Court in *Wilson*, *Tomanio*, *Chardon*, and *Johnson* did adopt the *per se* rule proposed by the defendants, we believe that the rule is applicable only to actions brought under the Reconstruction Civil Rights Act. In that Act, Congress has expressly provided that gaps in federal law are to be filled by analogous state law. *See* 42 U.S.C. § 1988; *see also Burnett v. Gratten*, 468 U.S. 42 (1984); *Tomanio*, 446 U.S. at 483 ("[F]ederal courts are *obligated to apply* . . . the analogous New York statute of limitations to respondent's federal constitutional claims."); Special Project, *supra*, 65 Cornell L. Rev. at 1041 n.138. It can be argued that section 1988, in effect, imports the Rules of Decision Act analysis back into this limited class of federal question cases and, much like in diversity actions, requires the court to apply state substantive law. Under such a scheme, the broad rationale of *Walker*, 446 U.S. at 740, might compel a federal court to adopt the rule proposed by defendants for civil rights actions, but not for federal securities claims.[14] *See, e.g.*, *Marek*, ____ U.S. at ____, 105 S. Ct. at 3017-18 (rejecting lower court's narrow construction of Fed. R. Civ. P. 68 so as not to result in perceived direct, unavoidable conflict with section 1988). *Chardon*, 462 U.S. at 650 (narrowly construing federal tolling rule announced in *American Pipe & Construction Co.*, 414 U.S. 538, such that state tolling rule applies).

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[14] Alternatively, section 1988 might be nothing more than a congressional codification of the judicial presumption to apply state law to fill gaps in federal law. *See Wilson v. Garcia*, 471 U.S. 261, 105 S. Ct. 1938, 1944 (1985); *Robertson v. Wegmann*, 436 U.S. 584 (1978); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); Note, *Civil Rights: Determining the Appropriate Statute of Limitations for Section 1983 Claims*, 61 Notre Dame L. Rev. 440, 442 (1986). If this is true, it supports our conclusion that the application of analogous state law is discretionary, not mandatory.

In addition, in *Wilson* the Supreme Court recognized that section 1988 was concerned with the need to provide intrastate uniformity in all civil rights actions. The reasons for the need for intrastate, as opposed to interstate, uniformity in civil rights actions are largely absent in cases such as the one at bar.[15] The Reconstruction Civil Rights Act was designed to give citizens a remedy, not substantive rights, against their state officials for what were largely perceived as "ancient common-law" torts. *Wilson*, ____ U.S. at ____, 105 S. Ct. at 1945. Thus, states have a strong interest in having their officials subject to uniform limitations periods and in having their state law torts which have been "constitutionalized" subject to the same procedures. But states have no such definable interest in 10b-5 cases that is sufficient to require nonuniformity of procedures among the federal courts.[16] This con-

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[15] In fact, some commentators have argued that even in the civil rights context there is a paramount federal interest in national uniformity. *See, e.g.*, Note, *supra*, 61 Notre Dame L. Rev. at 452; Note, *A Call for Uniformity: Statutes of Limitations in Federal Civil Rights Actions*, 26 Wayne L. Rev. 61 (1979); *cf. DelCostello*, 462 U.S. at 151. Even in *Wilson*, the Court relied on the need for national uniformity when deciding how best to characterize section 1983 claims.

[16] To the extent that the states do have any interest, the application of Fed. R. Civ. P. 3 does not unduly compromise their right to set certain limitations periods. *Cf. Walker*, 446 U.S. at 751-52 n.12 (service requirement does little to keep stale claims out of court); *see* Note, *Federal Practice*, 32 S.C.L. Rev. 627, 633 (1981). The action must be filed in federal court before the state statute of limitations expires, and it must be served within 120 days thereafter or the action will abate. *See* Fed. R. Civ. P. 4(j). Defendants thereby are provided with reasonable notice of the claim and are protected against stale claims when they reasonably believed their liability had ceased. In the instant case, for example, the defendants were served within one month of when they would have had to have been served under state law, and they do not claim that this one month delay prejudiced them in any way. *Cf. Hanna*, 380 U.S. at 462-63 (federal rule controls over state rule when rules directly conflict and when no change in outcome results); *Sylvestri v. Warner & Swasey Co.*, 398 F.2d 598, 606 (2d

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clusion is particularly appropriate in cases such as the one at bar which are cognizable only in the federal courts. Special Project, *supra*, 65 Cornell L. Rev. at 1033 n.102; *cf. Burnett*, 380 U.S. at 433 (Rejecting application of various state saving statutes because they "would defeat the aim of a federal limitation provision designed to produce national uniformity."); *Holmberg*, 327 U.S. at 392 (suggesting that the policy of uniformity with the probable outcome in the courts of the forum state was inapplicable in a non-diversity case where the plaintiff asserted an equitable right created by federal law.). *But see Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1041 (10th Cir. 1980) ("For reasons equally applicable to implied securities fraud actions, the Supreme Court has recently held that coordinate state tolling rules apply along with state statutes of limitations in suits brought under 42 U.S.C. § 1983.").

The defendants correctly observe that the Supreme Court has rejected the argument that uniformity of pro-

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[16] *continued*

Cir. 1968) (When compliance with both state and federal commencement requirements is still possible at the time the action is instituted, the outcome is not determined ultimately by filing in federal rather than state court.). *See* Ely, *supra*, 87 Harv. L. Rev. at 710. In that article, Professor Ely observed:

> The point of *Hanna* dictum is that it is difficult to find unfairness of a sort that would have troubled the framers of the Rules of Decision Act, or of a sort whose elimination would justify disrupting a federal court's routine, when the difference between the federal and state rules is trivial, when their requirements are essentially fungible. . . . Thus, whenever the sanction for noncompliance is dismissal, there is a sense in which "enforcement" of the rule can be outcome determinative. But it is a backhanded sense, and one that implicates the concerns that gave rise to the Rules of Decision Act only when the underlying mandate thus enforced is sufficiently more or less burdensome than its state counterpart to support a plausible claim of unfairness.

Id. at 713-14 (footnotes omitted).

cedure in the federal courts is a sufficient basis upon which to reject application of state limitations periods. *See, e.g., Wilson*, 471 U.S. at ____, 105 S. Ct. at 1947; *Tomanio*, 446 U.S. at 489. *But see, e.g., DelCostello*, 462 U.S. at 151. In our view, the rejection of that argument is based, in part, on the courts' reluctance to undertake to formulate limitations periods. But as we have previously observed, the courts have been less reluctant to adopt or formulate federal tolling rules, *see supra* note 6, and they have done so on the ground of promoting uniformity of procedure among the federal courts. *See, e.g., Moviecolor, Ltd.*, 288 F.2d at 80; *cf. Hanna*, 380 U.S. at 462-63 n.1 (adopting section 4(d)(1) on the ground, *inter alia*, of the promotion of uniformity, even though the Court apparently recognized that the state service rule that was ultimately rejected, operated, at least in part, as an integral tolling provision).[17]

In *Moviecolor, Ltd.*, for example, Judge Friendly found uniformity a persuasive reason for employing a uniform federal tolling doctrine in cases at law under the Clayton Act. He reasoned that there was a paramount federal interest in the uniform administration of rights cognizable only in the federal courts, such that "the state statute of limitations should be tolled during the defendant's fraudulent concealment of the alleged wrongful act." 288 F.2d at 84 (citing *Holmberg*, 327 U.S. at 392) (introducing fraudulent concealment doctrine into federal suits at equity); *see Newman v. Prior*, 518 F.2d 97, 100 (4th Cir.

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[17] In *Hanna*, the Court observed:

> One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules. This is especially true of matters which relate to the administration of legal proceedings, an area in which federal courts have traditionally exerted strong inherent power, completely aside from the powers of Congress expressly conferred in the Rules.

380 U.S. at 472-73 (quoting *Lumbermen's Mutual Casualty Co. v. Wright*, 322 F.2d 759, 764 (5th Cir. 1963)).

1975) (In federal securities claim, "[e]ven when state law furnishes the period of limitation, federal law controls its commencement."); *see also* Special Project, *supra*, 65 Cornell L. Rev. at 1031 n.91 ("Mandatory application of state law on these subsidiary issues could seriously undermine federal interests involved in suits on federal claims."); Note, *Limitation Borrowing in Federal Courts*, 77 Mich. L. Rev. 1127, 1136 (1979) (Even when federal courts borrow state statutes of limitations, courts must consider the problem of maintaining uniformity among federal courts in different states enforcing the same right.); *cf.* Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797, 804 (1957) ("[T]here remains a freedom, after decision to incorporate local law, to control the extent and methods of that adoption which is not present when a determination has been made that state law will apply because the court has not competence to do otherwise."). *But cf. Tomanio*, 446 U.S. at 483 (federalism favoring absorption not only of state period, but also subsidiary issue of tolling); *Johnson*, 421 U.S. at 463-65 (state period incomprehensible without absorbing integrally-related tolling rules).

The defendants argue that if uniformity of procedure is a decisive factor, it should operate against the application of Fed. R. Civ. P. 3 in these cases. They assert that nonuniformity, rather than uniformity, is promoted because actions will be subject not only to different limitations periods in each jurisdiction, but to a separate federal tolling rule as well.

We do not agree. In our view, application of Fed. R. Civ. P. 3 will promote greater uniformity because the commencement of all federal causes of action will be governed by the same rule. Although the causes of action may be subject to different state limitations periods, all such cases in every jurisdiction will be deemed commenced as

of the date of filing.[18] In this vein, it is significant that the application of state commencement rules might unduly complicate procedures in the federal system. As one commentator has observed, the problems created by applying state statutes of limitations when cases are, for example, transferred within the federal system because of improper venue or lack of personal jurisdiction would be substantially compounded by applying state commencement rules. *See* Note, *supra*, 66 Cornell L. Rev. at 858 n.94. These procedural complications would not be counterbalanced by any definable state interest. This nonuniformity also might lead to serious inequities as plaintiffs who had successfully complied with all tolling requirements under one state law might have failed to achieve it under the new forum law and hence would be barred.

Based on the foregoing discussion, we believe that the Supreme Court did not hold in *Wilson*, *Tomanio*, *Chardon*, or *Johnson*, that when a state statute of limitations is borrowed, all of its integral tolling provisions must also be borrowed even in the face of directly controlling uniform federal law.[19]

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[18] Furthermore, we note this is not a situation in which the application of the federal tolling rule renders the state limitations period a "meaningless number." *See* Note, *supra*, 22 UCLA L. Rev. at 961 (criticizing federal tolling rule announced in *Holmberg* for eviscerating state limitations period). The complaint still must be filed within the limitations period and served within 120 days thereafter. *See supra* note 16.

[19] Some commentators have observed that it might be difficult for a court to rule that Fed. R. Civ. P. 3 tolls the applicable state statute of limitations in cases such as the one at bar under the broad interpretation of *Walker*. They argue that "[i]f the plain meaning of the rule controls, then the scope of rule 3 should not differ [from diversity actions] in actions to enforce federal rights." Note, *supra*, 66 Cornell L. Rev. at 851; *see also* Fed. R. Civ. P. 3 advisory committee note 4, 28 U.S.C. App. at 394-95 (1976); H.R. 7154, 97th Cong., 2d Sess. n.14, *reprinted in* 1982 U.S. Code Cong. & Ad. News 4437, 4441 n.14. In their view, such an approach avoids the need to make the same phrase mean one thing in one legal

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This brings us to what we believe is the defendants' stronger argument—*i.e.*, that under *Walker*, 446 U.S. at 749, Fed. R. Civ. P. 3 does not operate as a tolling provision in cases such as the one at bar. Most of the relevant facts of *Walker* are virtually indistinguishable from the facts here. The state statute of limitations period provided that a lawsuit was not commenced until the complaint was filed and the defendant was served with a copy of the complaint. Service could be effectuated after the limitations expired, but it had to be completed within sixty days of filing. The plaintiffs filed suit within the relevant state statute of limitations period, but failed to effectuate service of process within the requisite sixty-day period. The plaintiffs argued that Fed. R. Civ. P. 3 controlled the

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[19] *continued*
context and another in another legal context. They argue that the better route for a court to follow is to fashion a federal common law from Fed. R. Civ. P. 3 in much the same way that a federal court fashions federal common law by looking to the most analogous state limitations period. Note, *supra*, 66 Cornell L. Rev. at 855. The commentators also choose this common-law rule over others such as tolling upon the filing of the complaint and the issuance of service or upon the obtaining of service because it comports with almost prior uniform practice in nondiversity action and because it is merely an extension of a longstanding practice in equity. *Id.* at 856 n.90.

Although we recognize that a federal court is empowered to devise rules through federal common law, *see* Special Project, *supra*, 65 Cornell L. Rev. at 1034; Note, *supra*, 66 Cornell L. Rev. at 857 n.92, we decline to adopt that approach. Our decision that Fed. R. Civ. P. 3 directly applies in this case does not require us to make a heretofore unheard of distinction between the "plain meaning" of the rule in non-diversity cases and its "plain meaning" in diversity cases. There is no doubt that Fed. R. Civ. P. 3 operates as a tolling provision in federal causes of action expressly governed by federal limitations periods unless Congress has otherwise provided a commencement provision. Thus, there is already a pre-existing distinction between these "plain meanings" of the rule in some non-diversity and all diversity cases. Our approach merely draws the line between non-diversity and diversity actions, rather than categorizing a large category of non-diversity actions as diversity actions.

issue of when an action was commenced for purposes of tolling the statute of limitations. The Supreme Court rejected this argument, finding that the federal rule did not control.

The defendants argue that this analysis controls this case. We disagree. To be sure, in *Walker*, the Court found that "the scope of . . . Federal Rule [3] . . . [was not] sufficiently broad to control the [tolling] issue before the Court," 446 U.S. at 750, and that there was nothing in that rule to indicate that Congress intended it to toll a statute of limitations, "much less that it purported to displace state tolling rules for purposes of state statutes of limitations." *Id.* at 751. *But see Schiavone*, ____ U.S. at ____, 106 S. Ct. at 2385 (In a diversity case, the Supreme Court stated "[r]ule 3 concerns the 'commencement' of a civil action. Under Rule 15(c), the emphasis is upon 'the period provided by law for commencing the action against' the defendant. An action is commenced by the filing of a complaint and, so far as Time is concerned, no complaint against it was filed on or prior to May 19, 1983."). *Walker*, however, was based on diversity jurisdiction involving only state-created rights. As such, it was governed by *Erie v. Tompkins*, 304 U.S. 64 (1938), and the Rules of Decision Act, and the Court in *Walker* expressly recognized that its decision did not necessarily control cases such as the one at bar. *See id.*, 446 U.S. at 751 n.11; *see also Guaranty Trust Co. v. York*, 326 U.S. 99, 101 (1945); C. Wright & A. Miller, *supra*, § 1057 at 191; Note, *supra*, 66 Cornell L. Rev. at 851. In fact, it recognized that in a previous case it had suggested "that in suits to enforce rights under a federal statute Fed. R. Civ. P. 3 means that filing of the complaint tolls the applicable statute of limitations." *Walker*, 446 U.S. at 751 n.11 (citing *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 533 (1949)).[20] In *Ragan*, the Court observed:

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[20] In *Walker*, the Court observed that in the original advisory committee notes on Fed. R. Civ. P. 3 committee members recognized

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> [T]he argument [is] that the Federal Rules of Civil Procedure determine the manner in which an[y] action is commenced in the federal courts—a matter of procedure which the principle of *Erie R. Co. v. Tompkins* does not control. It is accordingly argued that since the suit was properly commenced in the federal court before the Kansas statute of limitations ran, it tolled the statute.
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> That was the reasoning and result in *Bomar v. Keyes*, 162 F.2d 136, 141 [(2d Cir. 1947), a civil rights case]. But that case was a suit to enforce rights under a federal statute. Here, as in that case, there can be no doubt that the suit was properly commenced in the federal court.

337 U.S. at 532-33 (footnote omitted). *But see Hanna*, 380 U.S. at 470 (characterizing *Ragan* as involving a federal rule that did not govern the tolling of statutes of limitations).

The rationale of *Walker*, of course, is broader than *Ragan*. In *Ragan*, the Court applied state law because the state commencement procedure was substantive and an integral part of the state statute of limitations. *Walker*, however, appeared to go beyond this by constricting the plain meaning of Fed. R. Civ. P. 3, in order to avoid an "unavoidable" direct conflict with the state commencement rule. *Walker*, 446 U.S. at 749 (quoting *Hanna*, 380 U.S. at 470). In fact, some commentators have argued that

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that the tolling of a statute of limitations might affect substantive rights. It observed that the Note "does not indicate, however, that Rule 3 was intended to serve as a tolling provision for statute of limitations purposes, it only suggests that the Advisory Committee thought the Rule might have that effect." 446 U.S. at 750 n.10. In the House Report, H.R. 7154, 97th Cong., 2d Sess. n.14, *reprinted in* 1982 U.S. Code Cong. & Ad. News, 4441 n.14, on Rule 3, the Representatives recognized the ambiguity caused by the broad rationale of the Supreme Court's decision in *Walker*, but refused to conclude that *Walker* would mandate application of the state tolling provision in a federal question case.

the Court awkwardly construed Fed. R. Civ. P. 3 in *Walker* in order to avoid a serious Rules Enabling Act problem, *see* Walker, *supra*, 19 Wake Forest L. Rev. at 977-78; Note, *supra*, 32 S.C.L. Rev. at 635; Note, *supra*, 66 Cornell L. Rev. at 852 n.62, a problem that, as we have demonstrated, does not exist in this case. *See* discussion, *supra*, at 8-10.

In addition, in reaching this result, the Court in both *Walker* and *Ragan* reasoned that any other result would give the state claim longer life in the federal court than it would enjoy in the state court. *Walker*, 446 U.S. at 746, 748; *Ragan*, 337 U.S. at 533-34. *But see Hanna*, 380 U.S. at 466-69 (In analyzing the scope of a federal rule in a diversity case the "outcome-determinative" test is not controlling and must be viewed in light of discouragement of forum-shopping and avoidance of inequitable administration of the laws.). The Court's main focus in *Walker* and *Ragan* therefore was with the possibility that the state claim might have longer life in the federal court than in the state court. The reasoning of *Walker* is simply inapposite here. Even assuming that all commencement procedures are an integral part of the state's statute of limitations, in cases such as the one at bar, courts are simply not confronted with the possibility that failure to adopt the state commencement procedure would substantially alter the enforcement of a state-created right. Compare the civil rights case where the failure to adopt the state commencement procedure would give a "constitutionalized" tort claim longer life than an ordinary tort claim in state court.

Thus, even *Walker* makes clear that the rationale applicable to diversity cases is inapposite in federal question cases because the federalist considerations, including the Rules of Decision Act analysis, are absent. *See DiVerniero*, 635 F. Supp. at 1535; Special Project, *supra*, 65 Cornell L. Rev. at 1091 n.380 ("If *Walker* is not simply an interpretation of rule 3, but an '*Erie* case,' the application of state commencement law may be a product of limitations upon the scope of the federal rules imposed by

the Rules Enabling Act, 28 U.S.C. § 2072 (1976). Under this view the application of rule 3 might be broader in nondiversity cases than in diversity cases."); Note, *supra*, 66 Cornell L. Rev. at 851 ("The opinion in *Walker* suggests that the Court looked beyond the plain meaning of Rule 3 . . . [b]y focusing on the substantive component of state law. . . ."); *cf. Levison v. Deupree*, 345 U.S. 648 (1953) (In admiralty action, federal law controls the issue of relation back of amendments.); *Jones & Laughlin Steel v. Mon River Towing, Inc.*, 772 F.2d 62, 65-66 (3d Cir. 1985) (In admiralty action, Fed. R. Civ. P. 4(j), not 42 U.S.C. § 742, governs when service of process must be made.).

Several recent labor cases support the result we reach today. *See Macon v. I.T.T. Continental Baking Co.*, 779 F.2d 1166 (6th Cir. 1985); *Berthelot v. Martin Marietta Corp.*, 630 F. Supp. 929 (E.D. La. 1986); *Thomsen v. United Parcel Service*, 608 F. Supp. 1244 (S.D. Iowa 1985). Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1982), is the statute of limitations applicable to unfair labor practice claims. It provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the [National Labor Relations] Board and the service of a copy thereof upon the person against whom such charge is made." In *DelCostello*, the Supreme Court considered which statute of limitations should be applied to a "hybrid" claim that an employer had breached a provision of a collective bargaining agreement, *see* 29 U.S.C. § 185 (1982), and that the union had breached its duty of fair representation by mishandling the grievance proceedings, a claim for which Congress has not provided a limitations period. The Court overruled prior cases in which it had held that state statutes of limitations for vacation of arbitration awards should govern, borrowing instead the six-month period set forth in section 10(b) of the Act. The Court noted that the general rule is that federal courts borrow a limitations period from the state in cases such as these, but that federal courts are not obligated under the Rules of Decision Act,

28 U.S.C. § 1652, to borrow a state, rather than a federal, limitations period. 462 U.S. at 159-61 n.13. It found that state statutes of limitations were "unsatisfactory vehicles for the enforcement of" this federal "hybrid" cause of action. It thus looked to federal law and decided that section 10(b) should be applied because it was "actually designed to accommodate a balance of interests very similar" to that presented in the section 301/fair representation setting. *Id.* at 169.

In *Macon*, *Berthelot*, and *Thomsen*, each of the defendant unions argued that the employee's "hybrid" suit was untimely because, although the complaint was filed within the six-month period of section 10(b), it was not also served on them within that six-month period as required by section 10(b). In the unions' view, in ruling that section 10(b) applied to these types of actions, the *DelCostello* Court intended to adopt both its filing and service requirements.

All of those lower courts rejected this interpretation of *DelCostello*, employing the same rationale. They observed that in *DelCostello*, the Supreme Court focused its analysis on "discover[ing] . . . the appropriate length of time within which to commence a hybrid . . . action," and not on the interrelated issue of the application of tolling provisions. *Thomsen*, 608 F. Supp. at 1245; *accord Macon*, 779 F.2d at 1170 & n.2; *Berthelot*, 630 F. Supp. at 930. The courts further observed that although "limitations periods and tolling provisions are closely interrelated," it did not compel a court "to deviate from the general rule that in a federal suit to enforce a federal right, the filing of the complaint tolls the limitations period." *Thomsen*, 608 F. Supp. at 1245; *accord Macon*, 779 F.2d at 1170 n.2. In the courts' view, following a contrary rule would promote nonuniformity among suits brought in federal courts. In reaching this result, the courts also relied on Fed. R. Civ. P. 4(a), providing for service of process, and on cases which held that even when a state limitations period is borrowed, tolling occurs upon filing (in accord-

ance with Fed. R. Civ. P. 3) notwithstanding the fact that the state's law requires service on the defendant to toll the statute of limitations. *Macon*, 779 F.2d at 1170 n.2, 1171; *Thomsen*, 608 F. Supp. at 1245-46.

Finally, relying on Justice White's dissent from the denial of certiorari in *Simon v. Kroger Co.*, ____ U.S. ____, 105 S. Ct. 2155, 2156 (1985),[21] a case in which the Eleventh Circuit had reached precisely the opposite result, *see also Williams v. Greyhound Lines, Inc.*, 756 F.2d 818, 820 (11th Cir. 1985) and cases cited therein; *West v. Conrail*, 780 F.2d 361 (3d Cir. 1985), *cert. granted*, ____ U.S. ____, 106 S. Ct. 3293 (1986), the courts noted that the rule proposed by the unions would drastically reduce the six-month limitations period since the plaintiffs would have to effectuate service of process in the manner prescribed by the Federal Rules. On these grounds the courts concluded, as did Justices White, Brennan, and Marshall, that tolling was governed by the Federal Rules and that the

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[21] In dissent, Justice White, joined by Justices Brennan and Marshall, stated:

> The lower courts agree that a suit in federal court on a federal cause of action is commenced, and the statute of limitations tolled, upon the filing of the complaint. *See, e.g., Hobson v. Wilson*, 737 F.2d 1, 44 (CADC 1984); Fed.Rule Civ.Proc. 3.; 2 J. Moore & J. Lucas, Moore's Federal Practice ¶ 3.07 (4.-3-2] (1984). While the time for service of process is not open-ended, see Fed.Rules Civ.Proc. 4(a), 4(j), it need not occur within the limitations period. Ordinarily federal practice thus conflicts with the specific terms of this borrowed statute of limitations. In light of this inconsistency, the brevity of the limitations period, and the fact that § 10(b) was not intended to apply to judicial proceedings, the result below is obviously incorrect. In practical effect, the Eleventh Circuit's ruling shortens the 6-month period by the amount of time necessary to effect service under the Federal Rules. Section 10(b) does not have a similar impact in administrative proceedings, in which service is accomplished merely by placing a copy of the charge in the mail. Compare Fed.Rule Civ.Proc. 4 with 29 CFR § 102.113(a) (1984).

Simon v. Kroger Co., ____ U.S. ____, 105 S. Ct. at 2156.

result reached by the Eleventh Circuit was "obviously incorrect."

These cases support the view that *Wilson* and *Walker* notwithstanding, cases such as the one at bar are governed by Fed. R. Civ. P. 3 and 4. They recognize that when a federal court borrows a limitations period, it is not required to adopt all integral tolling provisions, particularly when there is a federal rule which directly controls the issue. Although each of these cases was decided after the Supreme Court decided *Wilson*,[22] in none of them did the court address the applicability of or believe they were barred by the dictum of *Wilson* that the defendants in this case assert is controlling. And, the Sixth Circuit found neither *Wilson* or *Walker* to be controlling on the same grounds that we have set forth above. *Macon*, 779 F.2d at 1172 & n.5.

In sum, although the result urged by the defendants is not without some support, the overwhelming weight of both judicial and scholarly authority supports the application of Fed. R. Civ. P. 3 to cases such as the instant one. The passing dicta of the Supreme Court in *Wilson* is too slender a reed upon which to reject this weight of authority, particularly in light of other Supreme Court dicta in *Ragan*, *Walker*, and *Hanna* which counsel a contrary result. The difficult issue raised by this case would, of course, have been obviated had Congress provided a federal limitations period. We join the growing number of commentators and courts who have called upon Congress to eliminate these complex cases, that do much to consume the time and energies of judges but that do little to advance the cause of justice, by enacting federal limitations periods for all federal causes of action. *See, e.g.*, Special Project, *supra*, 65 Cornell L. Rev. at 1105; Note, *supra*, 61 Notre Dame L. Rev. 440, 452-53 (1986);

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[22] Justice White's dissent in *Simon* was also filed after *Wilson* was decided.

Note, *supra*, 77 Mich. L. Rev. at 1146; Note, *supra*, 53 Colum. L. Rev. at 77-78. Until such time as Congress heeds that call, however, courts must continue to resolve these cases by reconciling apparently conflicting, and often ambiguous, authorities. In this case, upon sifting through the authorities, we conclude that Fed. R. Civ. P. 3 applies to toll a state statute of limitations which governs a federal cause of action solely because of the absence of an express federal limitations period.

III

The defendants also argue that even if we find that the federal claim was timely, we should affirm the dismissal with prejudice of the related state law securities claim that was subject to the same three-year Wisconsin statute of limitations.[23] We agree. Under the rationale of *Walker* and *Ragan*, no other result is permissible. The plaintiffs at oral argument suggested that they could circumvent this result by amending the complaint to allege the state law claim and have that amendment relate back to the date of filing such that the state securities claim would be timely. This suggestion ignores the fact that even under the relation-back doctrine the amendment is timely only if the amended claim would have been timely "commenced" had it been filed on the date to which the amendment relates back. *Walker* and *Ragan* demonstrate that in this case the amended securities claim would not have been properly commenced as of that date and hence it is therefore barred.

Regarding the plaintiffs' negligence and fraud claims, we also agree with the defendants that those claims were properly dismissed without prejudice because, although

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[23] Although the district judge dismissed the state law claims under *Gibbs*, this court can affirm that dismissal on any ground that the record supports and that was properly preserved by the parties. Those criteria have been met in this case.

the six-year limitations period has not yet expired, the plaintiffs failed to serve the defendants within sixty days of filing. Wis. Stat. § 801.02(1) (1983). However, because those claims are not yet time-barred, the plaintiffs reserve the right to amend the complaint and comply with state service requirements. Relation-back is of no consequence because the actions are not yet time-barred.

The judgment of the district court is affirmed in part, reversed in part, and remanded for further proceedings.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 12, 1986.

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Senior Circuit Judge*

SENTRY CORPORATION and SNE CORPORATION,
Plaintiffs-Appellants,

No. 85-2824 *vs.*

ETHEL R. HARRIS, as Trustee under the Trust Agreement dated March 1, 1973, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 84 C 855 C—**Barbara B. Crabb**, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc in the above-entitled matter filed by the defendants-appellees and the opposition thereto filed by the plaintiffs-appellants, no judge in regular active service called for a vote on the suggestion that it be reheard en banc, the members of the panel voted to deny the petition.

IT IS THEREFORE ORDERED that said petition for rehearing be and the same is hereby DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WISCONSIN

SENTRY CORPORATION, SNE CORPORATION,

Plaintiffs,

No. 84-C-855-C *v.*

ETHEL R. HARRIS, as Trustee under Trust Agreement dated March 1, 1973, ETHEL R. HARRIS, Successor Trustee under Mortimer B. Harris Trust Agreement dated December 26, 1979, JEANNE HARRIS HANSELL, an individual, HELEN HARRIS BRANDT, an individual, MARY HARRIS MARKS, an individual, WILLIAM M. REDFIELD, an individual, NANCY BARRY, an individual, NANCY JO BARRY, as a Custodian for Anita Barry, a Minor under the Idaho Uniform Gift to Minors Act, NANCY JO BARRY, as a Custodian for Julie E. Barry, a Minor under the Idaho Uniform Gift to Minors Act, NANCY JO BARRY, as a Custodian for Michelle Barry, a Minor under the Idaho Uniform Gift to Minors Act, NANCY JO BARRY, as a Custodian for Phillip Barry, a Minor under the Idaho Uniform Gift to Minors Act, NANCY JO BARRY, as a Custodian for Sean Patrick Barry, a Minor under the Idaho Uniform Gift to Minors Act, MICHELLE BARRY, an individual, EDWARD S. SEIM, an individual, PHILLIP BARRY, an individual, BONNIE DWYER, as a Custodian for Richard J. Dwyer, a Minor under the Illinois Uniform Gift to Minors Act, BONNIE DWYER, as a Custodian for Sheila Marie Dwyer, a Minor under the Illinois Uniform Gift to Minors Act, BONNIE DWYER, as a Custodian for Kristy Dwyer, BONNIE DWYER, as a Custodian for Robert P. Dwyer, HERB DWYER, an individual, BONNIE DWYER, an individual, DANIEL L. GRAY, as a Custodian for Jean Ann Gray, a Minor under the Illinois Uniform Gift to Minors Act, DANIEL L. GRAY, as a Custodian for Karen Gray, a Minor under the Illinois Uniform Gift to Minors Act, DANIEL L. GRAY, as a Custodian for Thomas J. Gray, a Minor under the Illinois

Uniform Gift to Minors Act, JOSEPHINE GRAY, an individual, MARY GRIMES, as a Custodian for Anna M. Grimes, a Minor under the Uniform Gift to Minors Act, MARY GRIMES, as a Custodian for John Grimes, a Minor under the Uniform Gift to Minors Act, MARY GRIMES, as a Custodian for Mary E. Grimes, a Minor under the Uniform Gift to Minors Act, MARY GRIMES, as a Custodian for Kathleen Grimes, a Minor under the Uniform Gift to Minors Act, MARY GRIMES, as a Custodian for Therese Grimes, a Minor under the Uniform Gift to Minors Act, MARY GRIMES, as a Custodian for William Grimes, a Minor under the Uniform Gift to Minors Act, MARY GRIMES, as a Custodian for Michelle F. Grimes, a Minor under the Uniform Gift to Minors Act, THOMAS J. MANEY, as Trustee under the Anne Mary Riordan Trust dated January 2, 1973, THOMAS J. MANEY, as Trustee under the Mary T. Riordan Trust dated June 28, 1972, THOMAS J. MANEY, as Trustee under the Patrick Jogues Riordan Irrevocable Trust, THOMAS J. MANEY, as Trustee under the Thomas L. Riordan Trust dated June 28, 1972, LORRAINE McCAHILL, a Custodian for Mary Jo McCahill, c/o Thomas McCahill, LORRAINE McCAHILL, as Custodian for Patrick M. McCahill, c/o Thomas E. McCahill, Jr., LORRAINE McCAHILL, as Custodian for William F. X. McCahill, c/o Thomas E. McCahill, THOMAS E. McCAHILL, JR., and MRS. LORRAINE McCAHILL, as Joint Tenants with the Right of Survivorship and not as Tenants in Common, SANDRA PRENDERGAST, an individual, LAWRENCE T. RIORDAN, an individual, VIRGINIA A. RIORDAN, an individual, LOUISE B. MYERS, an individual, WAYNE HUMMER & CO. by PHILIP M. BURNO, DANA LYNN HARRIS, by THOMAS NEW HARRIS, her guardian, ELLEN D. A. HARRIS, an individual, HELEN N. HARRIS, as Executor of the Will of Francis L. Harris, deceased, HELEN H. HARRIS, an individual, JODY LEIGH HARRIS, by THOMAS NEW HARRIS, her guardian, JULIET M. HARRIS, an individual, KEITH W. HARRIS, an individual, KENNETH A. HARRIS, an individual, KENNETH A. HARRIS, JR., an individual, LYNN HARRIS MERLO, an individual, S.H. HARRIS, an individual, HELEN M. WILLNER, an individual, THOMAS NEW HARRIS, an individual, JANE STADELMAN

BARNES, an individual, EVELYN E. STADELMAN, an individual, LEONA T. STADELMAN, an individual, LYNN A. STADELMAN, an individual,

Defendants.

ORDER

This is an action for equitable relief and money damages based on certain misrepresentations defendants allegedly made in selling their controlling shares of the Harris-Crestline Corporation to plaintiffs. Plaintiffs bring Count I of the complaint pursuant to Section 10(b) of the Securities Exchange Act of 1934 as amended in 15 U.S.C. 78j(b) and Securities and Exchange Commission Rule 10b-5, with jurisdiction asserted under Section 27 of the Securities Exchange Act, 15 U.S.C. §78aa. Plaintiffs invoke the doctrine of pendent jurisdiction over Counts II, III and IV of their complaint, which include state law claims of common law intentional fraud, negligent misrepresentation, and violation of Wisconsin securities law, Wis. Stat. §§551.41, 551.59(1) (1981-82). Plaintiffs seek indemnification for all costs arising out of chemical contamination of the soil underlying the facilities of the business they purchased from defendants, contending that defendants knowingly or negligently misrepresented the condition of the facilities before the stock sale.

Defendants have moved to dismiss plaintiffs' complaint on the grounds that 1) suit is barred by the stock purchase agreement under which plaintiffs obtained control of Harris-Crestline Corporation; 2) the action should be dismissed or stayed pending the resolution of prior pending state proceedings on parallel questions involving the same agreement; 3) plaintiffs' complaint fails to state a claim under federal securities law; 4) plaintiffs failed to plead fraud or knowledge on the part of defendants with sufficient particularity; 5) suit is premature; and 6) the complaint is barred by the applicable statute of limitations.

FACTS

Taking the allegations of the complaint as true for the sole purpose of deciding this motion, I find the following as fact: On October 30, 1981, defendants, then shareholders of Harris-Crestline Corporation, an Illinois Corporation, sold their controlling shares of stock in Harris-Crestline to plaintiff, Sentry Corporation, a Texas corporation operating primarily as a holding company with headquarters in the Western District of Wisconsin. SNE corporation is a wholly owned subsidiary of Sentry organized under Wisconsin law. In selling the stock, the selling shareholders made the following representations to plaintiffs:[1]

> (a) Harris-Crestline as of the date of the sale of stock was in compliance, in all material respects, with all statutes, laws, rules, regulations, governmental permits and governmental authorizations then applicable to the Company, or to its subsidiary Crestline International Sales Corporation, or to either of their properties;
>
> (b) that all real property improvements on Harris-Crestline's or its subsidiary's properties as of the date of the sale were in operating condition and repair and conformed in all material respects to all applicable ordinances, regulations and other laws;
>
> (c) that the financial statements delivered to Sentry "fairly" represented the financial condition of the company and its subsidiary as of the date of the statements;
>
> (d) that during the interim period before closing, Harris-Crestline and its subsidiary had not undergone any change in their conditions, financial or otherwise,

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[1] In their briefs, defendants assert and plaintiffs concede that these representations were contained in the Stock Purchase Agreement between the selling shareholders and plaintiffs, executed on October 30, 1981.

including changes in assets, liabilities, businesses or operations not in the ordinary course of business;

(e) that during the interim period before closing, they would cause Harris-Crestline and its subsidiary to comply in all material respects with all statutes, laws, rules or regulations applicable to the corporation or its subsidiary or to either corporation's business; and

(f) that during the interim period before closing, they would promptly advise Sentry, in writing, of any materially adverse change in Harris-Crestline's or its subsidiary's financial condition, operations, business or properties.

From 1978 onwards (and for an unspecified time before 1978) Harris-Crestline stored a chemical substance known as pentachlorophenol (penta) in three underground tanks with capacities ranging from 3000 to 15,000 gallons. Harris-Crestline used the chemical, which is classified as a hazardous substance, to treat the wood components of its windows. In 1978, when Harris-Crestline was planning certain improvements on its property, the corporation directed a civil engineer to take core samples from the underlying soil. These samples revealed the presence of penta contamination up to 20 feet below the surface. Upon discovery of the contamination in 1978, Harris-Crestline sent the core samples to St. Louis for further tests by the Coppers Corporation, a manufacturer of pentachlorophenol. The results of these tests, which were communicated to Harris-Crestline, confirmed the presence of the hazardous substance.

Under Wisconsin law in effect at the time of plaintiffs' stock purchase, any entity responsible for discharging hazardous substances into the environment was under a duty to inform the Wisconsin Department of Natural Resources (DNR) of the discharge and to bear all the costs of restoring the environment and minimizing any harmful effects. Prior to the sale of the Harris-Crestline stock, the selling shareholders never informed plaintiffs that core

samples taken from Harris-Crestline's property had indicated pentachlorophenal leakage; never informed the DNR of the discharge; took no steps to eliminate or control the discharge; and never informed plaintiffs that Harris-Crestline would be responsible for the clean-up.

Plaintiffs first discovered the existence of the penta contamination in September, 1984. Those selling shareholders who were also officers and directors of Harris-Crestline knew of the chemical spill before they sold their stock to plaintiffs. Even if the remaining defendants did not have actual knowledge of the penta contamination, they knew that they did not have adequate factual grounds on which to represent that the corporation was in sound condition and in compliance with all laws and regulations. The selling shareholders' failure to disclose the existence of the chemical spill was material to plaintiffs' decision to purchase the stock. Had they known of the spill, plaintiffs either would not have purchased the stock or would have bargained for financial provisions compensating for the situation or for measures correcting it. Plaintiffs have suffered a loss due to the presence of the chemical substance on the property they acquired from Harris-Crestline.

RECORD FACTS

Plaintiffs filed this action on October 26, 1984. Service of process was not effected until January 30, 1985.

OPINION

Ripeness

As a threshold matter, defendants claim that plaintiffs' complaint is not ripe for review because Harris-Crestline has not been found to be in violation of any environmental law.

" '[R]ipeness turns on the fitness of the issues for judicial determination' and 'the hardship to the parties of withholding court consideration.' " *Pacific Gas & Electric*

Co. v. State Energy Resources Conservation and Development Comm'n, 461 U.S. 190, 201 (1983), quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). Central to the determination of ripeness is whether a case involved speculative or contingent events which may never occur. *Alcan Aluminum v. Department of Revenue of Oregon*, 724 F.2d 1294, 1295 n. 1 (7th Cir. 1984). Defendants assert that plaintiffs' claims hinge upon an adjudicated finding of non-compliance with applicable laws and regulations, and that it is not the role of this court to determine whether any violations have occurred. Plaintiffs contend that the injury they allege is independent of any administrative finding of environmental violation, and that the injury is immediate rather than speculative or remote.

As the owners of property on which a leak of hazardous substances has occurred, defendants were under an immediate statutory duty to remedy the problem. As successors to defendants in the ownership of the Harris-Crestline facilities, plaintiffs have inherited that same duty. Wis. Stats. §144.76 (1983-1984) provides in pertinent part that:

> A person who possesses or controls a hazardous substance or who causes the discharge of a hazardous substance shall notify the department immediately of any discharge . . .
>
> A person who possesses or controls a hazardous substance which is discharged or who causes the discharge of a hazardous substance shall take the actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands or water of this state.

Wis. Stats. §144.76(2), §144.76(3) (1983-1984). No separate adjudication is necessary to compel plaintiffs to undergo the expenses of clean-up. Furthermore, the selling shareholders' representations to plaintiffs were not limited to assertions that Harris-Crestline was in compliance with the law. They also represented that "all real property im-

provements on Harris-Crestline's or its subsidiary's properties as of the date of sale were in operating condition and repair. . . ." Clearly, the extensive penta contamination in core samples taken from Harris-Crestline's property indicates a defect in the operation and repair of the company's underground chemical tanks. Plaintiffs allege in their complaint that they have already suffered a loss as a result of the contamination. While the complaint does not identify a particular loss, taking plaintiffs' allegations as true as I must on a motion to dismiss, I find that plaintiffs have suffered harms sufficient to render this action ripe for consideration.

Statute of Limitations

Because I find that this action is barred by the applicable statute of limitations, it is unnecessary to address the remaining grounds for defendants' motion to dismiss.

Defendants contend that this action is barred by both the three-year and the one-year statute of limitations set out in the Wisconsin Uniform Securities Law, Wis. Stats. §§551.01-551.57 (1982), which provides, in pertinent part, that "No action shall be maintained under this section unless commenced before the expiration of three years after the act or transaction constituting the violation or the expiration of one year after the discovery of facts constituting the violation, whichever first expires . . ." Wis. Stats. §551.59 (1982).[2] Section 10(b) of the Securities Act of 1934, on which federal jurisdiction in this case is based, does not provide its own statutory limitations period. In this situation, the limitations period is determined by reference to the most closely analogous state statute. *Sperry v. Barrgren*, 523 F.2d 708, 710 n.1 (7th Cir. 1975).

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[2] The Wisconsin legislature amended §551.59(5) on April 26, 1984 to delete the one-year limitations period. *See* 1983 Wisconsin Act 216. However, the earlier version of §551.59(5) controls this action, because the amendment was not retroactive.

There is no disagreement between the parties as to which state statute determines the limitations period. However, there is disagreement whether state or federal law determines when an action is commenced in a case brought under a federal statute that provides no limitations period of its own.

Defendants argue that Wisconsin law governs. In Wisconsin, an action is not deemed commenced until the complaint has been filed and the defendant has been served. Wis. Stats. §893.02(1). Wisconsin requires service of the defendant within sixty days of filing the complaint. Wis. Stats. §801.02(1). The three-year limitations period began to run on October 30, 1981, the date of execution of the stock purchase agreement containing the alleged misrepresentations. Plaintiffs filed this action on October 26, 1984, four days before the expiration of the three-year period, but they did not serve the defendants until January 30, 1985, some 90 days later.[3] Defendants argue that under Wisconsin law, this action was not commenced until well after the expiration of the three-year limitations period.

Plaintiffs argue that it is federal law that determines the commencement of the case for statute of limitations purposes. They cite Rule 3, Federal Rules of Civil Procedure, which provides that "a civil action is commenced by filing a complaint with the court." In addition, they contend that the service of process is governed by federal law and, specifically, by Rule 4(j) of the Federal Rules of Civil Procedure, which requires service of process within 120 days of filing. Under these rules, plaintiffs contend, their action is timely.

At the heart of defendants' argument is the proposition that if, in the absence of its own enunciated limitations period, a federal court is required to borrow a statute of limitations from an analogous state statute, the court

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[3] Had they served defendants within 60 days, the suit would be deemed to have been commenced as of the date of filing. Wis. Stats. §80L02(1).

should similarly borrow the state provisions concerning the tolling of the statute: ". . . the length of the limitations period, and closely related questions of tolling and application, are to be governed by state law." *Wilson v. Garcia*, ____ U.S. ____, 105 S.Ct. 1938 (1985) (slip opinion at 7). In its discussion of a statute of limitations question different from the one at issue here,[4] the Supreme Court made reference to the following principle, enunciated in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975):

> Any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action. Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting prosecution of stale ones. In virtually all statutes of limitations the chronological length of the limitation is interrelated with provisions regarding tolling, revival, and questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim.

421 U.S. at 463-464.

In *Johnson*, the Court rejected an argument that federal law governed the tolling of the statute of limitations in

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[4] In *Garcia*, the Court held that federal law governed the characterization of an action for purposes of identifying the analogous state statute for statute of limitations purposes and that other matters such as the measurement of the statutory period itself are governed by state law.

an action brought under 42 U.S.C. §1981.[5] This is consistent with a line of cases in which the Court has rejected the application of federal tolling rules in actions brought under statutes with borrowed limitations periods. *See, e.g., Chardon v. Fumero Soto*, 462 U.S. 650, 657 (1983); *Board of Regents v. Tomanio*, 446 U.S. 478, 484 (1980) (42 U.S.C. §1983). In each of these cases, the clash was between a clear state statute and a non-uniform federal judicial rule. *Chardon v. Fumero Soto*, 462 U.S. at 662 (no uniform federal rule of decision mandating suspension rather than renewal of statute of limitations when a federal class action is filed); *Board of Regents v. Tomanio*, 446 U.S. at 491-92 (rejecting "ad hoc federal rule" that tolled statute of limitations for §1983 action during pendency of state court Title VII suit); *Johnson v. Railway Express Agency*, 421 U.S. at 467 (no relevant body of federal procedural law on whether filing of Title VII suit tolls statute of limitations for §1983 action). By contrast, Rule 3 of the Federal Rules of Civil Procedures is an unequivocal rule of universal application. However, the distinction is of insufficient consequence to prevent the application to the present case of the rule favoring state tolling provisions. In *Johnson* and the other cases, the Supreme Court did not merely balance the weight of clear state statutory language against less uniform judicial practice; it set forth the principle that a state's tolling rules are an integral part of its statute of limitations and should be applied in actions under a federal statute with no limitations period of its own.

To support their argument that Rule 3 controls the commencement of this action, plaintiffs cite a line of cases including *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980) and *Wells v. City of Portland*, 102 F.R.D. 796 (D. Oregon 1984). In *Walker v. Armco Steel Corp.*, the Supreme Court determined that state service of process

[5] 42 U.S.C. §1988 requires federal courts to refer to state statutes when federal law provides no rule of decision for actions brought under the federal civil rights statutes, 42 U.S.C. §1981 *et seq.*

rules govern in federal cases based upon diversity; but reserved the question whether Rule 3 operated to toll the statute of limitations in federal question cases. 446 U.S. 740, 751 n. 11. Plaintiffs argue that *Walker* should not be extended to federal question cases. They point out that the policy behind adopting state service of process rules in diversity actions is to prevent forum shopping and to avoid giving state claims longer lives in federal court than they would have in state court. In plaintiffs' view, the same policies do not apply in federal question cases, especially to an action under Section 10b of the 1938 Securities Act, which can be brought only in federal court.

It is true that the prevailing rule in the federal courts of appeals is to apply Rule 3 in non-diversity cases where a federal cause of action is involved. *See* the cases cited in *Wells v. City of Portland*, 102 F.R.D. 796 at 800. However, the controlling factor in this case is not simply whether a federal cause of action is involved, but whether the statute of limitations is established by federal law or borrowed from state law. Although plaintiffs are correct in arguing that *Wells* is factually very similar to the situation in the present case, the opinion in that case does not address this distinction. In *Wells*, the plaintiff filed her complaint pursuant to 42 U.S.C. §1983 two days before the borrowed state statute of limitations ran, but did not effect service until after the state mandated 60 day period. Although the district court cited *Board of Regents v. Tomanio*, 446 U.S. 478, as authority for borrowing the state limitations period in the absence of a federal one, it failed to follow that case's more important ruling that state tolling rules are integral parts of the state's statute of limitations. In its opinion, the court cited a number of federal appeals court decisions. However, each of the cited cases involved federal question cases in which the limitations period was established by federal law.[6] None of the decisions involved federal statutes which

[6] *Jordan v. United States*, 694 F.2d 833 (D.C. Cir. 1982) (28 U.S.C. §2401(b); 6 month time period for tort claims against the

(Footnote continued on following page)

rely on a state's judgment in setting limitations periods and interrelated tolling provisions. In deciding *Johnson v. Railway Express Agency*, 421 U.S. 454, the Supreme Court explicitly rejected as inapposite cases cited by the petitioner involving limitations periods set by federal statutes. 421 U.S. at 466. Because *Wells v. City of Portland* fails to note the distinction between federal statutes with specific periods of limitation and those without such periods, it is not persuasive. I conclude that Wisconsin's three-year statute of limitations bars plaintiffs from bringing this suit.

Defendants' alternative argument that plaintiffs' suit is barred by the one-year statute of limitations requires little discussion. The Wisconsin statute sets the limitations period for securities actions at "3 years after the act or transaction constituting the violation or . . . one year after the discovery of facts constituting the violation, *whichever first expires*. . . ." Wis. Stats. §55L59(5) (1982) (emphasis added).

Defendants contend that plaintiffs were in possession of facts that would have led them to an early discovery of the violation had they exercised due diligence. Defendants allege that plaintiffs had full access to Harris-Crestline's records prior to the execution of the stock purchase agreement in 1981, and should have discovered the penta spill in 1981, so that the statute would have run in 1982. Plaintiffs contend that they did not learn of the pentachloropenal contamination until September of 1984.

It is unnecessary to resolve this dispute. Even if defendants were unable to establish that plaintiffs knew of the

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[6] *continued*

United States); *Caldwell v. Martin Marietta Corp.*, 632 F.2d 1184 (5th Cir. 1980) (42 U.S.C. §2000e-5(f)(1); 90 day period for claims under Title VII of the Civil Rights Act of 1964); *United States v. Wahl*, 583 F.2d 285 (6th Cir. 1978) (28 U.S.C. §2415(a); six year period for government contracts actions.

violation before September, 1984, the three-year statute of limitations running from the date of the acts constituting the violation would have expired well before the expiration of the one-year statute and this action would be barred.

Pendent State Claims

It is a well-established rule of law that when federal claims are dismissed before trial, pendent state claims should also be dismissed. *United Mineworkers of America v. Gibbs*, 383 U.S. 715, 726 (1966); *Metz v. Tootsie Roll Industries*, 715 F.2d 299, 307 (7th Cir. 1983); *Continental Assurance Co. v. American Bankshares Corp.*, 601 F. Supp. 277, 280 (E.D. Wis. 1984). As the Court stated in *United Mineworkers of America*,

> It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants.

383 U.S. at 726.

If the pendent state law claims would be vulnerable to motions to dismiss on statute of limitations grounds were they brought again in state court, the court could maintain jurisdiction over them even though the federal claim has been dismissed. *O'Brien v. Continental Illinois National Bank & Trust*, 593 F.2d 54, 65 (7th Cir. 1979). In this instance, however, plaintiffs' state fraud and negligent misrepresentation claims are governed by a six-year statute, Wis. Stats. §893.93(b), and can go forward in state court. Moreover, those claims will necessarily involve interpretation of the Stock Purchase Agreement between the selling shareholders and plaintiffs under state law. Thus, a state court is the most appropriate place for them.

ORDER

Therefore, IT IS ORDERED that Counts I and IV of plaintiffs' complaint are DISMISSED as barred by the statute of limitations, and Counts II and III are DISMISSED under the doctrine of pendent jurisdiction.

Entered this 30th day of September, 1985.

BY THE COURT:

/s/ Barbara B. Crabb
District Judge